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SUPREME COURT

OF THE

UNITED STATES.

ASHBEL GREEN AND WILLIAM BOND,
As Trustees, under First and Only Mortgage,
COMPLAINANTS,

VS.

CHICAGO, SAGINAW AND CANADA
RAILROAD COMPANY,
DEFENDANT.

POINTS FOR APPELLANTS,

RICHARDSON & DAY,

IN No. 181.

L. D. NORRIS,
Of Counsel.

GRAND RAPIDS, MICH.
West Michigan Printing Company, 81 Lyon Street.
1889.

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DEFENDANTS.

Points for Appellants in No. 181.

The case is foreclosure of a first and only Railroad mortgage.

The appellants Richardson & Day intervening bond claimants appealing, by authority of the Court below, (R. 337 to 339 and 1 and 5) from the decree so far as it affects *distribution*, and the net amount of proceeds, only. All appellants are as follows:

Nos. 181 and 1074 intervening bond claimants, either as owners, or as pledgee holders.

Nos. 947 and 1027 as judgment creditors.

Nos. 181 and 1074 have paid to the clerk their allotted share, for printing and fees.

Nos. 947 and 1027, declining, upon notification by the clerk to pay their share, No. 181 then paid it, in order that they (No. 181) might not lose the hearing of their appeal, at this present term (Oct., 1888,) and in its order.

The Trustees and the R. R. Co. have no special interest, in the result.

The R. R. Co. is long since defunct, except that its stockholders under the Statutes of Michigan, if insolvent, may be pursued and reached.

I.

THE GENERAL APPELLATE QUESTION.

Is the just distribution of $264,202.89 reported surplus of proceeds of mortgage sale; and whether that reported surplus ought not to have been greater, *inter alia*, because:

(A) Of a sale made by the Court below, through its receiver, of the R. R. Co's. wrought iron bridge, over the Saginaw river, for $20,000, (R. 30 to 34) "*free of the lien* of the bondholders," (R. 33) and,

(B). Of the preferred distribution by the decree of $137,154.94 among other claimants than appellants.

The gross product of mortgage foreclosure, coming to the hands of the Court below is given (R. 1224 F. 2630 1–2) at $401,359.83.

II.

UPON WHAT TO BE HEARD, HERE.*

Customarily it would be upon appellant's exceptions (R. 255 to 261) to the special master's
222) where overruled or disregarded i
(R. 294 to 301); but owing to the so
proceedings below, it is assumed that th
be, as it was in the Court below, upon said exceptions, together with such additional proofs as were taken (R. 1,135 to 1,219 and Exhibits, R. 362 to 384) by the permission and order of that Court (R. 1,135) after the special master's report, based upon *previous proofs*, had been filed.

III.

NO. 181 BENJAMIN RICHARDSON AND HENRY DAY'S CLAIM, AS APPELLANTS.

Richardson claims to have been:

(1). An owner of six hundred bonds, each for $1,000, and should that be found against him, as it was below, then:

(2). As pledgee holder of the same bonds, as collateral, to his advances to the R. R. Co. August 12th, 1876, put in judgment (R. 201 master's report) for $186,779.05, with its interest.

Whether he held these bonds, as owner, or as pledgee, turns upon the legality of the steps taken to close out this

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*Authorities upon questions of practice in considering exceptions to Master's Reports.
Dubourg de St. Colomb's heirs vs. U. S., 7 Pet., 625.
Ransom vs. Theiner, 18 How., 295.
Medsker vs. Bonebrake, 108 U. S., 71.
Fourniquet vs. Perkins, 16 How., 82.
New Orleans vs. Gaines, 15 Wall., 624.
Webb vs. Powers, 2 Wood, M., 497.
Chappedelaine vs. Dechenaux, 4 Cranch., 306.
West vs. Smith, 8 How., 402.
Forgay vs. Conrad, 6 Ibid., 206.

Nos. 181 and 1074 have paid to the clerk their allotted share, for printing and fees.

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II.

UPON WHAT TO BE HEARD, HERE.*

Customarily it would be upon appellant's exceptions (R. 255 to 261) to the special master's report (R. 171 to 222) where overruled or disregarded in the final decree, (R. 294 to 301); but owing to the somewhat anomalous proceedings below, it is assumed that the hearing here will be, as it was in the Court below, upon said exceptions, together with such additional proofs as were taken (R. 1,135 to 1,219 and Exhibits, R. 362 to 384) by the permission and order of that Court (R. 1,135) after the special master's report, based upon *previous proofs*, had been filed.

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pledge by sale, as shown in the Record. Day claims as purchaser, June 7th to August 3d, 1882, pendente lite, from Richardson, for value and with only such notice, as the Record *then* gave. (R. 718, 719 and 721 to 724.)

IV.

PROCEEDINGS.

During a period of many months, from and after January 11, 1879, proofs were taken by the leading bond claimants only; mostly in New York City. Finally, June 30th, 1882, there was a decree of foreclosure, and of reference to a special master (R. 84 to 88) Mr. John W. Champlin. This clause of the decree will be quoted infull, *post.* It is sufficient here to note, that he was authorized to take further proofs.

During the closing hours of proof before the master, Edward P. Ferry, then Ex-treasurer of the R. R. Co. by general acquiescence, was produced before the master to surrender a large number (1029) of unissued bonds. (R. 698 to 701.) He was also sworn as a witness and testified, to the fact that as a former treasurer, he had yet exhibits and vouchers of his office, which he would produce, and did, to the number of over 140 in addition to the 1029 unissued bonds. They were not closely examined by any one; went in in bundles

Afterward, the special master, among these exhibits, found one receipt, without date (R. 197) from Richardson to Ferry, treasurer, covering bonds and giving reference to another paper, made Aug. 20, 1875, giving listed numbers, which numbers included bonds No. 3201 to 3600, which Richardson claimed, and had in his possession as owner or pledgee. No. 3001 to 3200 the master found to be his legal pledge. No. 3301 to 3600 he found to be unissued bonds

illegally in his possession, and as to the 100, No. 3201 to 3300 he made no distinct finding though he refused to allow the entire 400, No. 3201 to 3601.

It was upon the authority of that receipt that the master disallowed Richardson's claim, to these 400 bonds; it was to explain that receipt; to show it a mistake; that the Court (R. 227 to 241 and 1135 Dec. 1, 1882,) permitted and ordered further proofs; after the making and filing Nov. 6, 1882, (R. 171) of the special master's report. Notwithstanding such further proofs, properly to be considered by that and this Court, though not before the master, the report of the master in this regard, though excepted to, (R. 255 et seq.) remained unchanged, and by the final decree, Day owner pendente lite, was deprived of the benefit, either as assignee, pledgee, or owner, of these 400 bonds.

This deprivation, may be considered *the gravamen* of this (No. 181) appeal.

V.

BRIEF HISTORY.

The Chicago, Saginaw & Canada Railroad Company, organized under the general Railroad law of Michigan, approved April 18, 1871, came into existence Dec. 25, 1872, just prior to the financial crisis of 1873. The scheme was then without merits. It was to build a road across the State from Grand Haven on Lake Michigan, to the city of St. Clair, on St. Clair river, a distance of 210 to 220 miles. Its capital stock was $4,200,000 in 42,000 shares. It had a board of nine directors, who also (with one other) were the only stockholders, *by subscription*, each taking 210 shares or a total $210,000, the law at that time requiring for organization, $1,000 per mile for stock, with five per cent. or $10,500 to be paid in.

The promotors (directors) were all non-residents of Michigan, except one Edward L. Craw; six were of Providence, R. I.; one of Illinois; one of Connecticut and one of Michigan.

The first directors meeting was held at Providence, R. I. At this meeting, beside the usual officers of the board, they appointed a secretary, salary $5,000, a solicitor, a chief engineer, salary $3,000, and they voted to bond the road for $20,000 a mile or $4,200,000 eight per cent. thirty year bonds. This was subsequently rescinded and the loan was voted at $5,500,000 gold bonds, seven per cent. The road was to be built—if built at all—by (1) local aid notes, (2) donated rights-of-way, (3) bonds put out in open market, (4) stock.

See the rceord of the R. R. Co. in evidence (R., p. 775 to 835) and the special master's report.

No stock was ever thereafter *subscribed* for; so far as stock was used it was voted by the directors or issued by the executive committee to various persons from whom the company had money, wholly to give these creditor persons supposed rights in the voting management of the company, whereby they might be induced to believe they could watch and control the disposal of their loaned money, to the end that the R. R. might honestly get built, and if it were, then to have a proportionate share in its value. If the five per cent. was paid in the company started with $10,500. May 15, '73, (R. 779) they increased the length of the road to 220 miles, and its bonded debt to the $5,500,000 seven per cent. gold, *ante*.

May 21, '73 its mortgage (R. 781 et. seq. and bond Ex. R. 1,226) was made. At this same meeting, though apparently without funds, $29,585.81 is ordered paid to the officers for promoters services and expenses, and F. A.

Nims, the solicitor's annual salary was fixed at $6,000; the president's at $12,000.

June 20, 1873, the *executive committee* is authorized to "sell and dispose of" bonds, etc.

June 30, 1873, by the By-laws, Sec. 12, (R. 795) the executive committee were given power to issue, at will, the unsubscribed capital stock.

July 28, 1873, Edward P. Ferry is made treasurer (R. 796); vacancies in the board are filled and John O'Byrne, an attorney and representative of those known in the master's report and record as the "Philadelphia parties," is made a director.

The first money aside from $10,500 of five per cent. said to have been paid in, was obtained from these "Philadelphia parties." It was July 8, 1873, about $60,000 in cash, notes and drafts, secured by deposit of "*aid notes*," always nearly worthless. On the hearing they were surrendered and filed; also by a promise of 120 bonds (they were not then signed by the trustees) afterwards performed by delivery of bonds.

Second money, February and March, 1874, from the same parties, about $50,000; one hundred bonds pledged as collateral.

The "Philadelphia parties" had also full paid stock.

Third money, September 15, 1874, was had of George G. Sickles, through contract made with his son, Daniel E. Sickles; $100,000 for 250 bonds as collateral, and stock, 1,000 shares, certificates No. 1 to No. 10 issued.

Fourth money, April 1875, was had of Richardson $100,000. This brings us to the appeal at bar, No 181, which will now be considered, in the following order:

1st—The special master's authority.

2d—His conclusion of (A) facts and (B) law.

3d—The appellant's exceptions thereto.

4th—The proofs taken, *after* filing of the master's report and *before* the hearing and decree below.

5th—The decree, and the modification thereof prayed.

VI.

THE ERRORS CLAIMED, BEING:

(A). That portion of the mortgage sale fund in which appellants were allowed to share, ought to have been greater.

(B). The share of the appellents, in that greater fund, should have been increased, by the decree of court below.

VII.

There is *a preliminary question.* as to the power of the Court below to order *a private* sale on the receiver's petition, of parcel of the mortgaged property, for $20,000, ($17,000 actually received, in money), to-wit: The wrought iron bridge over the Saginaw river *"free of the lien* of the trustees and the bondholders."

This matter being anterior, does not appear in the special master's report. It is shown in the record. (P. 30 to 54.) The proceedings for and the sale, were *exparte*, by stipulation of F. A. Nims, the solicitor of the trustee's foreclosing, and the solicitors of the defendant R. R. Co., that is, that no objection thereto would be by them made, and it was so endorsed on the receiver's petition. (R. 32.). The appellant Richardson afterwards intervened, and by petition (R. 33 to 37) challenged that, and three certain other *"consent orders."* Upon his petition there was an order to show cause. (R. 38.)

Cause was shown (R. 39 to 54) as to *the wisdom* of a sale, but none as to *the power* of the court to deprive the trustees and bondholders of their mortgage lien upon the bridge, or to order *a private* sale.

This interlocutory order was not vacated (R. 54) and its allowance was non-appealable (because interlocutory). The proceeds of sale went into the hands of the receiver, who finally paid into Court, subject to distribution, only the sum of $1,359.83. (R. 1219 F. 2619.)

Out of the proceeds of the mortgage sale, was also paid the receiver's debentures, the sum of $125,000 and interest. See decree (R. 297) amounting to near $130,000. (R. 1219 et seq.)

VIII.

MASTER'S PROCEEDINGS.

(A). His authority:

Is, (R. 86 clause VIII forclosure decree.)

"It is further ordered that the matter of the rights of all persons, claiming to be the holders for value, or owners of bonds, issued under said mortgage whether they have made proofs in reference to such claims or not, be referred to John W. Champlin," as a special master, examiner and referee, with power.

1. To examine claimant under oath.

2. To take such further and other proofs as he may deem essential to enable him to ascertain and report to this Court, which he is directed to do.

(A). What persons are owners of bonds issued.

(B). When they became owners.

(C). Upon what consideration.

(D). What persons are entitled to share in the sale fund by reason of holding for value, bonds as collateral to any indebtedness of the company.

(E). Or otherwise holding any equitable lien upon such bonds.

(F). Give amount of such indebtedness or lien, with lawful interest to date of report.

(G). Whether any, and which, are holders of bonds, as purchasers or otherwise, and may legally have priority out of the funds arising from sale.

3. To audit and pass receiver's account.

4. To report what, if anything, is to be allowed trustees.

Date of this decree is June 30th, 1882.

Subsequently (R. 151) the special master is ordered to ascertain and report the place and priority in the distribution of the sale fund, if any they lawfully had, for the appellant's in No. 947 and 1,027.

He has previously, (R. 97) by *exparte* order, been required to receive and report *proofs* for or against these last named appellants claims, without prejudice to other parties to the record. It was after this last named order that upon petitions (R. 122 to 146) demurred to (R. 147–8) *ore tenus* and overruled, petitioners were by order allowed to levy executions from the state court, on property in the receiver's hands, without disturbing his possession and without prejudice, etc. (R. 105).

It was the *place and priority* by virtue of such permitted execution *levy*, that the master was to look after and report.

(B.) HIS REPORT.

1. It gives Richardson and Day but 200 bonds—the final decree affirms that.

2. It does not consider the evidence taken (R. 1135 to 1218) *after* the master reported; and the court below in its final decree either did not consider, or it disregarded, such evidence.

The appealable question in this regard being, whether Richardson & Day were or were not, justly and legally entitled to participate in the distribution of mortgage sale proceeds, on a basis of *more* than 200 bonds.

The master's report will be followed, but as it does not find all the undisputed facts, material to the rightful decision of this question of more than 200 bonds, these undisputed facts will be given, with reference to the record, page and folio, where they are to be found.

The master's report also finds facts, for which there was and is *no evidence.* These when material will be noted.

This right of review and correction by this Court, is believed to have been saved and secured, by appropriate exceptions. (R. 255 to 261).

The special master's *first* report (R. 171 to 222) was defective. Upon petition (R. 222-3) and order (R. 224) he made a supplemental report (R. 225-6) stating with particularity, upon what his report was in fact based: and this "what," he returned and filed in court, so far as it had not before that been done.

Generally, the special master's report is obnoxious to just criticism, because as alleged in appellant's *nineteenth* exception (P. 259) it is:

(1). Largely argumentative.

(2). The findings of law and fact are commingled and confused.

(3). In its use of many such words and phrases as "It appears," "it must be remembered," "I think," and "I do not think," and "claims," touching facts necessary to be found absolutely, in order to an orderly review of the law, deduced by the master therefrom.

Much the largest bondholding was non-resident in Michigan, still there was a number of small holders, resident in Michigan, who had from the master about what they asked for; possibly upon the principle of "*de minimis*," and possibly upon the theory of the ancient

Roman vocabulary, which had one name for a stranger and an enemy.

The pages of the special master's report occupied by Richardson's claim are, (R., p. 190 to 202, F. 462) and the facts touching the R. R. corporate acts, to and with him, *necessarily* appear in its official record of proceedings. (R. 775 to 835.)

Richardson, up to March, 1875, was a total stranger to the C., S. & C. R. R. Co., its promotors, officers and scheme. His was the *fourth* money with which these officers purveyed themselves fat salaries and eastern junketing trips. The "Philadelphia parties" by their advances had loaned an amount which the master finds, principal and interest, (R. 189) at $218,278.61. Richardson's he finds at $273,-282.87. (R. 201). Sickles had also loaned $100 000. All previous to Richardson's loan was gone; nothing of substance had been done; more was to be sought for; so March 31, 1875, Richardson makes *his contract* with the company, which the master finds in full. (R. 190 to 193). He was then residing in New York, an industrious and saving old man, who, by a life of severe labor and privation, had got together a surplus, and with greater physical than intellectual resources, was desirious of becoming a central figure in some public enterprise that might bring him greater influence in the financial world, and increase his hoard.

He was by temperament, by want of business or other education, by his peculiar ambitions, in short, in all ways, a fit subject for being fooled to the top of his bent, by adroit schemers, on the look-out for money or its equivalent, credit. By this contract he gave to the R R. Co. officers $100,000 in his notes (subsequently all paid) "to purchase iron for constructing and completing a 20 mile divis-

ion of the Railroad west from St. Louis, Gratiot Co.;" the only division ever finished by the Railroad Co.

For this $100,000 the company were to give and to do, as follows:

(*First clause*). Give 200 bonds as collateral.

(*Second clause.*) This $100,000 should go *"to no other purpose"* than to purchase iron at lowest market price.

(*Third clause*). This division was to be completed "in time for the business of the coming summer."

(*Fourth clause*). Give seven per cent, interest, and as the entire issue of bonds is on sale in Europe, he was to get and take his money, if and when bonds are sold.

(*Fifth clause*). He was to be made a director, whereby his ambition would be gratified and he could see and direct the expenditure of his money, *for nothing but iron.*

(*Sixth clause*). The company *would* lease this to be completed division to another R. R Co. for not less than eight per cent. on cost, and assign that lease to him, and all subsidies, *upon that division,* as further collateral.

(*Seventh clause.*) He was to have 1250 full paid shares of capital stock, *" in consideration of the services rendered and to be rendered; in promoting the interests of the (R. R. Co.) by his recommendation and influence in the financial world, and otherwise, as far as may be, with equity and good conscience."*

NOTE.—The special master finds as to this stock, (p. 194) "I find nothing whatever *was paid* for this stock. The shares issued to Richardson, Elwell and Shaw, were issued to Richardson, or on his behalf, in pursuance of the seventh clause of the contract (above). It was on its face fully paid stock, and *by resolution of July 5th, 1875,* it was to be preferred stock and draw 7 per cent. interest."

The foregoing in italics, is an incorrect statement; has

no proof to support it, *as here given.*

The directors' meeting of July 5, 1875, passed no such resolution (R. 806 F. 1875) nor any of like purport. The meeting of August 3rd, 1875, however, (R. 807 F. 1876) passed a resolution of which the finding above is here, a half extract. This last named resolution is this: "Only 625 shares of the paid up *contractual* stock, out of the 1,250 shares, was ordered issued— the remaining 625 shares was ordered to issue—~~"~~as soon as the next 10 miles of the road shall be completed'"—and then it says "said stock shall be preferred stock, and shall draw interest at seven per cent. per annum, *such interest, however, to be payable only out of the ~~nett~~ (net) surplus* of the company on the first day of July in each year." (F. 1878). And the master's report *ante*, had fairly stated such resolution, as of its true date and purport, August 3d, 1875.

It is not an unfair suggestion touching the report of a special master making such statement, that his methods and ends need scrutiny. This error was pointed out and saved by exception *second*, (R. 255, F. 586) and the conclusions reached by the master (though not accepted in the decree) as to the legal effect of such contractual stock ownership, render it important that his findings should have support from some evidence, and be accurately and carefully stated.

It is a misleading finding—a misleading legal conclusion. from the found express agreement, giving the "*consideration*" of stock issued to Richardson, as before quoted—"that nothing whatever *was paid* for this stock." (R. 194.)

This seems to be an appropriate place to give a condensed history, of Richardson's connection and dealing with the Railroad Company and its officers—his associates.

Care will be taken, the Record being so voluminous, to state the undisputed action of Richardson and his co-officers, and the master's report will be followed; corrections and additional fact will be placed in squared brackets.

As to the director's meeting of April 3d, 1875, the master finds (R. 193);

"On April 3d, 1875, the Board of Directors met at St. James hotel, New York, and ratified the above contract and Richardson was elected director and on the 5th of April, 1875, received 200 of the bonds, Nos. 3,001 to 3,200, as collateral security under the contract."

[At this meeting Richardson was not present.

Cotemporaneous with the Richardson contract of March 31, 1875, *ante*, was one by John A. Elwell then of New York City, with the Railroad Company looking to the laying of the iron Richardson's money was to buy. Elwell was then a protege of Richardson and had then, his backing and confidence, and the two were co-operating with intent to get the Richardson loan *into iron and on the road.* Richardson furnishing the needed money for Elwell's performance of his contract. *Both these contracts* are ratified at this meeting (R. 805). Richardson was then without knowledge, of the previous financial deals, of his now corporate associates. (R. 406 and 617, 1023 F. 2226).

1875, April 15th, the treasurer E. P. Ferry discounts Richardson's $100,000 notes and gets cash $95,500.]

As to the directors meeting of May 28, 1875, (R. 805, F. 1874) the master finds (R. 193):

"On the 28th day of May, 1875, John A. Elwell was elected secretary of the company, and Richardson is placed on the executive committee. The company resolved to hire of Richardson a locomotive and cars at $300 a month, the company to keep them in repairs."

[Richardson in aid of Elwell's contract *ante*, had bought this locomotive and 20 flat cars. The former secretary, Klinck, had been lost at sea in the Schiller, May 7, 1875, en route for Europe, to aid McChesney and Gen'l Daniel

E. Sickles in trying to sell the bonds. Richardson is put on the executive committee, vice McChesney in Europe.]

Directors meeting of July 5, 1875 (R. 806, F. 1875.)

This is the master's report.

On July 5th, 1875, Richardson assigned 25 shares of the stock due him to Elwell, and Elwell was elected a director. The lease from the company to Richardson of the road was ratified and confirmed.

The secretary and treasurer were instructed to deposit with Richardson one hundred of the company's first mortgage bonds *as additional security for moneys advanced by him since March 31, 1875, and that may be advanced on the iron contract with the Cleveland Rolling Mill Company.*

It was resolved that the funds to be raised by the president or acquired from any other source should be applied, first to the liquidation of the account of J. E. Shaw, and next directly to the repayment of Richardson, for the amount paid or to be paid to the Cleveland Rolling Mill Company on account of iron contract. The subsidy notes were ordered to be turned over by the president to the secretary, for the benefit of the company.

J. E. Shaw was elected a director. Ten shares of Richardson's stock was issued to him by votes of the board, Oct. 11th, 1875.

Twenty miles of the company's road, leased to Richardson, June 1st, 1875, was ordered to be formally turned over to him by the president.

We state it, and other material undisputed facts, as follows:

[Elwell made director, *vice* Klinck, deceased.

It seems the company had a contract for iron with the Cleveland Rolling Mill Co.; that Craw as president, had, June 1, 1875, assigned to Richardson this contract as a fur-

ther collateral. This assignment was now ratified.

That on last named day, a lease of 20 miles of graded and located road bed had been made by president and secretary to Richardson. This was also ratified. Twenty-five shares of stock due Richardson by the company, were voted to be transferred to Elwell.

The located and graded 20 miles of road leased to Richardson as collateral was formally turned over to him. Also at this meeting they recite the receipt of Richardson's $100,000 and approve of its disposition by the treasurer, (only about 3-4 had in fact, gone into iron.) The admitted and agreed account of Richardson shows that he paid to the company, chiefly on the iron contract, $30,825.19, *between April 1, 1875, and July 6 and 10, 1875.*]

[We defer reference to the evidence *before* the master touching this additional 100 bonds No. 3,201 to 3,300 until the remaining numbers 3,301 to 3,600 are reached, as the *manual* receipt by Richardson of these 400 bonds, was on the same day and occasion, Aug. 20th and 21st, 1875.]

Directors meeting of Aug. 3, 1875.

The master's report as to this is (R. 193, 194) as follows:

"On Aug. 3d, 1875, E. P. Ferry tendered his resignation as treasurer and Benjamin Richardson was elected treasurer, the same *to take effect* as soon as Mr. Ferry's accounts as treasurer should be *adjusted* by the executive committee.

"It was unanimously resolved: 'That in consideration of the sums of *money advanced* by Benjamin Richardson, of New York, for this company, and of the *sums to be hereafter advanced* by him, for the purposes of extension and equipment of the road, *as well as advances made by him of every nature, whatsoever, that an additional amount of three hundred of the company's first mortgage bonds* of one thousand dollars each, *be conveyed* to said Richardson, *making a total of six hundred* of said first mortgage bonds of one thousand dollars each, *as collateral security for the re-payment to him of said sums so advanced.* Which sums

shall bear interest at the rate of ten per cent. per annum, payable annually, on the first days of January and July, of each year.'"

It was also resolved that for the *further securing* Mr. Richardson *for money or material, on account of the extension of the road to Lake View, or for money advanced on any other account*, a lease should be executed to him of such portion of the road so extended, as well as of the bridge across the river at Saginaw, on like terms as the lease of June 1st, 1875.

It was further provided that the company's notes might be given to Richardson for the company's indebtedness, on account of the use of his locomotive and cars.

The executive committee were given power to re-call J. H. McChesney as the loan agent of the company, if they should deem best.

It was also provided that certificates for six hundred and twenty-five shares of the company's paid up stock should be delivered to Richardson, in pursuance of the contract of March 1st, 1875, and that he should receive a similar amount when the next ten miles of road should be completed. The stock was to be preferred stock, and drew seven per cent. interest, *but payable only* out of the *net* surplus of the company, July 1st "of each year."

[The master is here simply reciting and finding the official proceedings at this meeting, given exactly, at (R. 807 et seq. F. 1876 to F. 1879); appellants have exceptions (R. 255 *first* and *fourth*) to portion of this finding; that these exceptions are well taken is apparent from inspection of the official Record. By this it is seen, that treasurer Ferry's resignation was not (as the master finds) to take effect as soon as *his accounts* as treasurer should be adjusted by the executive committee. (F. 1877).

The *obligations* that he had personally made for the benefit of the company were to be settled, or he *relieved therefrom;* the executive committee was empowered to do this,

and as this was never in fact done, Ferry never in fact or law, ceased to be the treasurer, and Richardson's election to his place (never vacant) was of no force. That Ferry remained still treasurer notwithstanding these proceedings, abundantly appears from all the evidence, which is undisputed. [R. 550, 614, 562, 363, 369, 370 is *part* of such evidence.]

This point is so plain, that, taken with other like *half* truth findings, such as this, referring to the director's meeting of Oct. 11–16, 1875, (R. 195) "one hundred and twenty thousand dollars of bonds were voted to Richardson *as a bonus*. These Richardson never *received*:" as if he stood *ready* to take them, if he could have got them, when in fact he repudiated the whole transaction, and took none (R. 385, 994 F. 2182) it leads to the just and legitimate inference, that it was the purpose of the master in the *argumentative report* he constructed for the court below, to so color the immense mass of proof (which would certainly not all be looked through by the court below) as to leave unfavorable impressions, as to the integrity of Richardson, who to any candid mind, familiar with *all the facts*, appears in the history more sinned against than sinning.

It is certainly true that by his associates on the board, it was *hoped* that he might be induced to assume and pay Ferry's personal liability, and so become treasurer, and his then trusted Lieutenant, Elwell, sent him the necessary notes for that purpose, (R. 368, 550) which Richardson would not sign.]

Director's meeting of October 11–16, 1875. (R. 809 to 815.)

[This meeting was the first at which "Philadelphia parties" and Richardson became fully advised, of the amount and character of the several advances, made by each.

The Michigan tail had up to this time, wagged the two New York and Philadelphia dogs, "separate and apart." There was here an attempt, to wag them together.

The first procedure was to equalize *contractual* stock holdings and leave the balance of power, in the Michigan *subscribed* stock. At this meeting the directors present were:

New York—Benjamin Richardson.

Philadelphia—J. O'Byrne and—later—Kelly.

Michigan—Craw, Ferry, Nims, Shaw and Elwell.

I place Shaw and Elwell among Michigan directors, for though before that made such, through Richardson's con-

tractual stock, they were *now* with the Michigan directors, anxious for more money—*from others than themselves.*

STOCKHOLDERS.

The foregoing were all such: but other Philadelphia *stockholders* were present at this meeting and had definite distribution of shares. So far as shown in this Record, the situation of the stock distribution at this date, Oct. 11 16, 1875, was as follows:

NEW YORK [*Contractual stock.*]

George G. Sickles or Daniel E. Sickles, 1,000 shares.

Benjamin Richardson, 1,250 shares; of this, to Shaw, 10, to Elwell, 25.

With regard to this *Sickles New York stock*, John A. Elwell, the man of all work, and witness of all words, for all sides of all questions, wherein the crooking of the pregnant hinges of the knee shadows the thrift that follows fawning, testified Sept. 29, 1881, that this was the *earliest stock*, and issued to Gen. Daniel E. Sickles. (R. 1,057, F. 2,279). He also testified in Aug., 1882, (R. 696, F. 1,649 et. seq.) that it was issued to George G. Sickles, the General's father.

General Sickles himself, though for four years from 1878 on, president, director and member of the executive committe of the R. R. Co., having R. R. and telegraphic passes (R. 697) is exceedingly hazy and indistinct as to *whose stock* he represented in such capacities. (R. 694 and 695). Still, it is *safe* to treat him as a New York stockholder.

PHILADELPHIA [*contractual stock.*]

Penniston	350	shares.
Betz	350	"
Bower	340	"
Dietrich	240	"
O'Byrne	10	"
Kelly	10	"
	1,300	

MICHIGAN [*subscribed stock.*]

Craw	210	shares.
Nims	199½	shares now surrendered for 10 full paid.
Ferry	199½	" " " " 11 " "

Also other original subscribed stock at organization (R. 776) 1,890 shares. *In the board of directors*, at this meeting stock stood as follows:

New York. Richardson, 1,215 shares, *contractual.*

Philadelphia.	O'Byrne,	10 shares, *contractual.*
	Kelly,	10 " "
Michigan.	Craw,	210 " *subscribed*, 5 per cent., paid.
	Ferry,	11 shares subscribed, called full paid.
	Nims,	10 shares subscribed, called full paid.
	Elwell,	25 contractual.
	Shaw,	10 contractual.

The master abstracts the proceedings of this meeting (R. 194, 195) given in full at (R. 809 F. 1879, to F. 1866).

But there is nothing found, and nothing in the record itself, that affects the question under consideration, viz., Richardson's *possession* of 600 bonds.

The same is true of the *stockholders* meeting of January 4th, 18th and 20th, 1876, when a new board and new officers were chosen; also of several meetings of directors and divers written up proceedings of the executive committee. (R. 815 to 826, F. 1,901.)

The master finds (R. 196) that at the *directors meeting of July 8th, 1876*, they by vote, admitted an indebtedness of the R. R. Co. to Richardson for money advanced $166,818.17; for interest to that date, $13,869.22, and for use of rolling stock, $4,900, making a total of $185,588.19; also directing what are known as stock notes (reciting collateral bonds, and powers of sale on default, public or private) to be given, which would in express terms recognize and affirm Richardson's then possession of pledged collateral bonds, six hundred of which had been certainly *voted* as the master finds. The question is, how many were *delivered?*

The resolutions found by the master (R. 196) read as follows:

The following preamble and resolution was adopted:

"Whereas, it appears that this company are indebted to Benjamin Richardson, of the city of New York, for moneys advanced by him, to the amount of one hundred and

sixty-six thousand eight hundred and eighteen dollars and ninety-seven cents, ($166,818.97) and interest accrued thereon, to date, to the amount of thirteen thousand eight hundred and sixty-nine dollars and twenty-two cents, ($13,-869.22) and for use of his rolling stock, for two locomotives and twenty-two cars, the sum of four thousand nine hundred dollars, making an aggregate of one hundred and eighty-five thousand five hundred and eighty-eight dollars and nineteen cents ($185,588.19,) therefore, resolved, *that the bonds issued* to said Richardson by this company for said aggregate amount ef one hundred eighty-five thousand five hundred and eighty-eight dollars and nineteen cents, *be, and the same are hereby ratified and approved.*" All the directors voted in the affirmative.

The following was also adopted, offered by Mr. Ham: "That, whereas, Benjamin Richardson has, heretofore, loaned and advanced to this company, a large sum of money, to-wit, the sum of one hundred and sixty-five thousand eight hundred and eighteen dollars and ninety-seven cents, on which there is a considerable amount of accrued interest; for which loan it has been understood that said Richardson should receive the promissory note or notes, of this company, bnt which have never been executed and delivered to him; *said loan having been secured by the delivery to the said Richardson of certain of the first mortgage bonds of the company,* and the company being unable to pay either said principal or interest, or any part thereof, the said Richardson, being desirous of realizing the money so as aforesaid loaned, therefore, it is resolved, that the Secretary of the company be, and he is hereby authorized and directed to execute and deliver to the said Richardson the promissory note, or notes, of the company, in the amount of said indebtedness, with the accrued interest

thereon, payable at such time as he may be able to agree upon with said Richardson, and at a rate of interest not to exceed seven per cent., *with an agreement embodied in such notes authorizing the holder thereof, in the event of the same not being paid, according to the terms thereof, to sell and dispose of said first mortgage bonds, pledged and delivered as aforesaid; or so many thereof as may be necessary,* either at public or private auction sale, and without previous notice to the company in the city of New York; and, if sold at public vendue, to become himself the purchaser of such bonds. A certified copy of this resolution, under the seal of the company, shall be delivered by the Secretary, with the notes executed under authority of this resolution."

O. W. Child was appointed director in place of Richardson.

The master finds that 200 bonds were delivered (R. 197). That July 5, 1875, the board of directors were instructed to deliver 100 more to secure past ($100,000) and future advances, and that Richardson the next day, July 6, 1875, did further advance *for iron* $25,647.79, but that the secretary and treasurer did not carry out the instructions.

The exact opposite of this is, and was, an undisputed fact.

Reference is now made to evidence, undisputed, *before the master.*

1. In a suit (R. 836 to 1,042) brought in the Supreme Court of the city of New York, to which the appellant Sickles, was a party plaintiff, Judge Donahue *found* as a fact, Richardson as pledgee to be in possession of 600 of these bonds (R. 447 to 448) the entire proceedings put in evidence by appellant Sickles appear at (R. 419 to 456).

As to Richardson's *possession* of the 100 (Nos. 3,201 to 3,300) as well as of the remaining 300; No. 3,301 to 3,600, see also: (R. 477, 478, 480, 481, 544 to 550, 397, 396 to 400, 407, 408. 587, 580, 591, 643, 999 and 1,000, all of the bonds

of the Co. attached, except Nos. 3,001 to 3,600). See also the stock notes sworn to have been given with *the numbers* of the *bonds 3,001 to 3,600* (R. 726,727) *recited* therein.

In all the testimony which came before the master, (with the single exception of *the receipt* to Ferry, before referred to) and in all the pleadings, claims or argument submitted to the master, and there were several hundred pages of printed argument and analysis presented by counsel, representing all the contending claimants, no claim was made, that challenged Richardson's *actual holding*, of these 600 collateral bonds, by the vote of the R. R. corporation.

The discovery, and *legal effect of the receipt*, was the master's exclusive patent.

Evidence not before the master, but before the District Judge.

At the date of the vote of July 5th, 1875, found by the master in the director's proceedings of that date, it by the evidence is shown that "the secretary and treasurer" did "carry out the instructions given by the meeting," as sufficiently appears from the following order:

Richardson & Day Exhibit. (R. 370.)

Grand Haven, Mich., July 5th, 1875.

Edward P. Ferry, Esq., Treasurer Chicago, Saginaw & Canada Railroad Company:

In compliance with a resolution passed by the Board of Directors of this company, please deliver to Mr. Benjamin Richardson, of the City of New York, one hundred (100) of the first mortgage bonds of our road, said bonds to be held by said Richardson as collateral security for monies advanced by him, as mentioned in said resolution of this date.

E. L. CRAW, President.
JOHN A. ELWELL, Sec'y.

[Written across the face]:—*Accepted.* EDWARD P. FERRY, Treasurer.

[Endorsed]:—Order for 100 bonds of the Chicago, Saginaw & Canada Railroad Co. July 5th, 1875. Richardson & Day exhibit 3, J. A. O., which was delivered to Richardson on the same day. [R. 1168 F. 2504.]

Surely this, was a separation and delivery of 100 bonds sufficient in equity, and one, one hundred, was as good as any other, "to carry out the instructions given by the meeting." A *manual* delivery was then impossible. The meeting and order for delivery, was in Muskegon, Michigan The bonds were then in the Mercantile Safe Deposit Co,. in New York. All this is covered by appellants "*third*" exception. (R. 255).]

Proceeding with the master's report (R. 197) under appellant's *fourth*, and *fifth* exceptions, (R. 255–6) the master now finds recited *ante*:

"On August 3, 1875, Mr. E. P. Ferry resigned his office as treasurer, to take effect when he should be settled with." [This was done so far, as that the executive committee *found* the balance due him.] "Richardson was at the same time elected treasurer to take effect, as soon as Mr. Ferry's accounts were adjusted" [paid] "by the executive committee." See *ante* [This was never done, for at the director's meeting of July 8, 1876, his then *unadjusted* (unpaid) accounts were provided for, with collateral bonds, which collateral bonds, by the way, were never *delivered* to him. He simply *took them* by authority of the resolution, from the *unissued* bonds in his own custody as treasurer. As the master finds Richardson did. Yet the master allows Ferry's taking to be lawful, covered by exception *twentieth* (R 259) and finds Richardson's unlawful. Certainly the rule is the same, for resident Ferry and non-resident Richardson—in Federal Courts.]

Continuing, *the master's report finds:*

"On the 20th of August, 1875, at Mr. Richardson's request, O. W. Child's and M. J. Baney examined the bonds of the company in New York City and found 2289 bonds, and they signed a statement to that effect, and gave therein the number of each bond."

[Here the master refers to Ferry's exhibit (R. 674) and then disregarding all that the evidence before him showed to have transpired, between Aug. 20, '75, and Oct. 11 '75, *affecting these bonds*, he finds "the Ferry receipt." What

this disregarded evidence was, is found in part as follows:

Sickles witness, Elwell (R. 477, 478, 480, 481) showing that the bonds were obtained by Richardson, Ferry personally *giving him the key to the bond safe* in witness' presence, etc., etc.

(R. 397 to 400 and 602 to 605) is Richardson's *first* account of how he got and held the 600 bonds.

(R. 550) is Elwell's statement, of how Ferry failed to go out, as treasurer.

(R. 653) Richardson's exhibits showing that when at his suit, all the unissued bonds of the Co. were seized, it did not include his 600.

(R. 726) Sickles Ex. D., C. and E (R. 1062), showing notes, said to have been given Richardson by authority of directors' meeting of July 8, '76, giving the bond numbers No. 3001 to 3600, which he held as collateral.

(R. 1049) Sickles' witness, Elwell, again gives the history of the delivery of bonds to Richardson. See also (R. 1066, 1078, 1081, 1085, 1086, 1087, 1104, 1110, 1112.)

Any examination of the foregoing testimony, all of which was before the master, should satisfy any candid person.

(1) That as matter of fact, on and after Aug. 21, '75, for more than one continuous year, Richardson had and kept in his exclusive possession No. 3001 to 3600—600 bonds, claiming them as collateral.

(2) That the board of directors officially recognized and affirmed his right to such possession.

(3) The way and manner he acquired that possession, and:

(4) That such possession was wholly *inconsistent* with the master's interpretation of the receipt of Oct. 12, 1875, *attached* to the paper list of bonds made by Baney and Childs Aug. 20, 1875.

No reference is made by the master to, nor does he find any of the undisputed proofs, of what was done with the bonds, *from Aug. 3, 1875 to Oct, 11, 1875.*

Under order and leave of the Court further testimony was taken, to make more clear to the Court what ought to have been sufficiently clear to the master, without such further proof.

This testimony is at (R. 1135 to 1218.)

The exhibits with it are at (R. 362 to 385.)

It is true (apparently) that after Ferry's conditional resignation and Richardson's conditional election to fill this expected vacancy, his associates on the board *had*

hopes that they could cajole him out of the money, needful for the executive committee to pay off Ferry's liabilities $20,000 — his personal advances $9,888.35 were said by Elwell to have been settled by 2, 4, 6, 8 and 9 months Co. notes. (R. 368 F. 863.) Richardson did not furnish the money nor promise it.

At the time he was asked so to do, and as an *inducement* for him to help the rats ashore from the sinking ship, Ferry in Grand Haven, Mich., through Elwell sent him, Richardson, at New York (R. 369 F. 868) a "*new* order" for the delivery of *all* the bonds then on deposit with the Mercantile Safe Deposit Co. in New York, and a *promise* to turn over *all books, accounts and vouchers* on his, Ferry's *receipt of two $10,000 notes.*

The *old* order (R. 370 F. 869) of date Aug. 3, 1875, the day of the directors meeting, voting them, made by Craw, president, and Elwell, secretary, on Ferry, treasurer, was for the delivery of 300 bonds as collateral security. *This* was accompanied by the key of the safe containing all the bonds, so Elwell testifies, (R. 477 F. 1103) and Ferry (R. 1204.) This order is found in Richardson's possession, produced and put in evidence. As this, with the key gave him access to the bonds, Elwell Aug. 16, 1875, enroute to Grand Rapids, instructs him to take his witnesses, make two lists with numbers of the bonds. But the "new order" gives larger authority and recites the fact, that he (Richardson) *then held the keys.* (R. 370 F. 868.)

Aug. 20, '75, this is presented to, and approved by, the bond trustees' attorneys, Alexander and Green. This day the bonds are taken, counted, listed and numbered (R. 371). Baney and Childs are the persons selected to count and number under authority of the two orders (F. 869 and 870). Childs, after listing all (R. 1153, F. 2471), selects out and lists 400—No. 3201 to 3600, 8 bundles, and delivers them to Richardson. A list and note of this delivery is made (R. 372, F. 873.) These Richardson takes into his exclusive *personal* possession, puts them with his other 200 into his private tin trunk, where they continuously remained (through many perils of New York jurisprudence) till in the same tin trunk they come to the clerk of the U. S. court at Grand Rapids as Richardson's exhibits.

The unissued "deposit" bonds of the company were then, by (as he terms himself) "Old Hickory Jackson" (Richardson), removed to the Park Bank, as a cheaper custodian, where they remained undisturbed until the memorable directors' meeting of Oct. 11—16, 1875, at the Quaker City

of "Brotherly Love." The list of numbers made by Baney and Childs, Aug. 20, '75, remained, and by *inadvertence and mistake*, the numbers of the 400 delivered to and taken possession of by Richardson, were *not erased*. This October meeting was not altogether a "love feast." Ferry *resumed* his duties as treasurer. He was not then re-elected; there had been no vacancy. Enlarged powers over the bonds "unissued" were given the executive committee and Richardson was made chairman of that committee and managing director of the R. R. Co., *irrevocable* until he was paid! Ferry was methodical, and as treasurer wanted a voucher for the custody of the bonds, so before by him delivered to the custody, of the "*expected to become*" treasurer, Richardson; the old list of Baney and Childs of Aug. 20, '75, being produced made the receipt (R. 197) with his 400 collateral bond numbers, *by accident* not erased. It was attached to the list, whereby Richardson was made to acknowledge himself custodian as chairman of the executive committee of these 400, with 1889 other numbered bonds, correctly so acknowledged. As to the 400, it was not *in fact* nor *in intention* true. Richardson gives his own account of this. (R. 1168 to 1173.) He was submitted to a rigid and minute cross examination, by the late distinguished criminal advocate, John Graham. (R. 1173 to 1191.) The exact material truth of all which appears at (R. 1186, F. 2548 and 2549) in a *few sentences*.]

The receipt basis of master's refusal to allow Richardson's bonds No. 3201 to 3600 reads as follows: (No date.)

"Received of Edward P. Perry, Treasurer of the Chicago, Saginaw and Canada Railroad Co., twenty-two hundred and eighty-nine (2,289) of the first mortgage bonds of the company, numbered as detailed by the memorandum above, dated New York, Aug. 20, '75, and signed by O. W. Child and M. J. Baney placed in my custody as chairman of the executive committee of said R. R. Co. in accordance with the resolution of the Board of Directors passed Oct. 11th, '75, for custody, disposal or sale.

BENJAMIN RICHARDSON."

The report then proceeds *argumentatively*. *It appears* that the bonds voted to Richardson as collateral on

the 3d day of August, 1875, being 300 in number were not in fact delivered to him under that vote. A pledge of bonds to be effectual must be delivered. These bonds *remained in the hands of Ferry until on and after Oct, 11th, 1875.*" [For this there is absolutely *no* proof: the proof and the whole of it, cited *ante* is that these bonds "being 300 in number" 3201 to 3600 passed out of Ferry's hands Aug. 20, '75, and forever thereafter, and continuously, remained out.]

The master's report proceeds, (R. 198.)

"*After* the 2289 bonds came to Richardson's possession under the above receipt" [given ante as on and after Oct. 11, '75,] "*he selected out* four hundred of them, numbered 3201 to 3600 inclusive and took them into his own individual possession." [There was not a *scintilla of proof* before the master that tends to show this selection "out," to have been *after Oct. 11, '75,* or on any other day, *after* August 21, '75.]

"The precise time this was done, does not appear."

[By the testimony taken after the master's report, this precise time does appear, Aug, 20–21, '75.]

The master says: "it was *prior* to the 8th day of July, 1876." For "Elwell, one of the directors was aware of the fact on the 8th day of July, 1876, when he made the notes to Richardson."

NOTE. (*As to correctness of the master's reading of the receipt.*) Is Ferry's receipt *of necessity* to be legally construed as the master construes it. He says (R. 198) "*The express terms* of his receipt *negatives* the idea, that they were (then) delivered, in pledge to Richardson for moneys advanced to the compay, previous to that date." Suppose that to be conceded, something more is needed. The express term of this receipt should—to reach the result the

master reached —*also negative the idea* that Richardson *could, after* its supposed date, lawfully take and hold, 400 of these (2289) bonds, which 400 had long before, been by the board of directors voted to be so taken and held, and these votes had never been rescinded or modified.

Now the express terms of this receipt in this regard were — "In my custody as chairman of the executive committee, in accordance with the resolution of the board of directors passed Oct 11, 1875, for custody, disposal or sale." And this resolution the master finds in part (R. 197–8) "That the executive committee shall have power to sell *and dispose of* the bonds, *authorized* to be issued for the *purposes of construction* and equipment, for such prices, and *on such terms*, as they may deem best for the interest of the company."

Now if Richardson as chairman of that committe "disposed of" 400 bonds, before that authorized to be issued for purposes of construction, on terms ~~as had been~~ previously voted by the board of directors, with or without the knowledge or acquiesence of the only other member of that committee, Kelly (R. 811 F. 1881) viz., took these 400 into his personal possession, as *the* 400 bonds so before voted to him, in pledge for his money advanced or to be advanced for construction, who can legally or equitably challenge that act. No one did challenge it, assuredly not Kelly: until the master did, in his report — given effect by decree.

The very money so advanced and so secured was the *last* money that went into the road. Pro tanto it increased the ultimate security of repayment for ~~*for all the previous*~~ *bond creditors* of the company.

RESUMING THE MASTER'S REPORT.

[This is the appropriate place to refer to the *director's action of July 8th, '76*, heretofore recited and found by the master. Referring to this resolution, the master says quoting these words of the preamble to the resolution, "said loan having been secured by the delivery to said Richardson of *certain* of first mortgage bonds of the company," and then he adds:]

"And the question is whether this has reference to the bonds delivered by the company to Richardson, April 5th, 1875, for which the treasurer held his receipt, or whether it refers to these and the 400 which the company had not delivered, but which Richardson had taken possession of *after* he had acquired the custody thereof as chairman of the executive committee, and which had been voted to him by the company as collateral security. If it refers to the latter, the company *ratified* Richardson's act in severing them from the body of the bonds in his possession and completed the pledge. As no mention is made of the number of bonds in the resolution and as the first two hundred bonds had been delivered to Richardson to secure the loan, and the four hundred had not been delivered, although voted. I find that the company never ratified Richardson's *unauthorized act* in severing the four hundred bonds from the bonds he had received as chairman of the executive committee for custody, disposal or sale. I find that the bonds numbered 3201 to 3600 inclusive have never been delivered by the company to him in pledge as collateral security for moneys advanced, *that they came to his hands as unissued bonds belonging to the company which he held in custody as an officer of the company.*"

[*Upon this question of ratification by the Company*; not in our view essential, to the validity of the pledge of the

600 bonds, so as before in Richardson's personal custody, since Aug. 21, '75.

It will be remembered that by the resolution of July 8, '76, the executive officers of the company were directed to give Richardson stock notes, for his debt.

Elwell testifies that this was done on that day (R. 976 to 980) Sickle's New York Record—and again (R. 1059 F. 2283 to F. 2287 et seq.) in testifying for Sickles, he gives copies of these notes, (R. 726, 727) which recite the numbers of these 600 bonds No. 3001 to 3600. Sickles' exhibits C, D, and E.

The substance of it all is, that July 8, '76, these stock notes expressly reciting the numbers of these 600 bonds, given as collateral, were delivered to Richardson; that he kept them and the bonds until on or about July 17th, '76, when at the request of Richardson's attorney, Davidson, Elwell tore them up and gave him new notes, of same date July 8, '76, and same amounts, because he Elwell, says: Davidson as Richardson's attorney, about to bring suit by *attaching* all the unissued bonds of the company, wanted the "*demand notes*" shown at (R. 415 F. 972 to F. 978), which went into judgment against the company, in a suit begun July 17, '76, (R. 456) not by attachment. It turns out that no suit was begun by attachment. If there was any attachment, it was as late as Aug. 11, 76, for judgment was Aug. 12, '76 on a complaint reciting but *two* notes, and unissued bonds were first seized Aug. 11-12, '76, and sold, in execution, Aug. 19, '76. (See the transcript of the record 456 to 464) and the identical notes sued on, supposed to have been *changed*, appear to have been protested, July 8, '76.

Elwells' testimony tends to show *collusion* between him and Davidson, to keep the pendency of this suit quiet, and keep knowledge of it away from the Philadelphia director Kelly, testimony cited ante. This Davidson wholly and indignantly denies (R. 588, 589, 590 et seq.)]

The master finds (R. 199) that "there is a direct conflict of testimony with reference to the *change* of notes."

[This is not accurate. The conflict was rather between Davidson and Elwell, as to Davidson's *knowledge or participation* in any change, or collusion.

The only material question that emerges from the chaos is, IF (after the master's method) stock notes containing the numbers of the 600 bonds were in fact made and delivered, it would have been an authorized official act of the R. R.

Co.'s officials, in obedience to its directors' resolutions and in affirmance and ratification, of these precise 600 bonds having been pledged as collateral, to Richardson.]

But the master would seem not to have been wholly satisfied with his report, excluding 400 of Richardson bonds for (R. 201) he now proceeds to assign other *argumentative* matter as follows:

"*If* the 300 bonds voted to Richardson on the 3rd of August, 1875, had been delivered. I do not think he could in equity and good conscience claim to hold them as security. *At that time the prospects of a foreign loan had disappeared.* McChesney *had been recalled* and the company were compelled to look to other resources to carry forward the work. Richardson had advanced up to that time $130,815.19. He had received $200,000 of the first mortgage bonds as security, *and $100,000 more had been voted to him but not yet delivered.* The three hundred bonds were voted to him on Aug. 3d, 1875, *upon the following considerations, as detailed* by the witness John A. Elwell, then secretary of the company: 'Mr. Richardson at that meeting spoke in favor of the extension of the road to Lake View, promised to render further assistance to the road financially towards the completion and the equipment of the road to that point, to Lake View, that was the contemplated terminus at that time.' He said in substance: 'I will stand by the road and furnish money, provided you will secure me in giving me more bonds.' Finally made a proposition, that if the company would authorize the further delivery to him of three hundred additional bonds, making six hundred in all, that he would furnish money for the completion and equipment of the road. The directors having taken some little time to consider Mr. Richardson's proposition, consented that a resolution should be passed

in his favor, granting the further issue of three hundred bonds to secure him for such funds, *as he might thereafter advance for the purpose of the extension and equipment of the road.*"

[It is a sufficient reply to this to recite the *sixteenth, seventeenth* and *eighteenth* exceptions (R. 258 F. 593 and 594). It is certainly idle for *a lawyer* to contend, that an informal colloquium (conceding Elwell to have truly stated the facts, recited by the master) and that they were *all* the facts, should be held to be "*the considerations*" upon which 300 bonds were voted to Richardson Aug. 3, 1875; when *after* all colloquium, "the considerations," larger and wider, were put in the *formal shape of a written resolution*, in express *dissent* from such narrow colloquium. Such resolution is found by the master to have been formulated and passed. See *ante.*]

Continuing, the master's report says:

"Mr. Richardson nowhere contradicts this statement of Mr. Elwell. Mr. Nelson testifies *that in August of 1875, Mr. Richardson assured him* that arrangements had been perfected for the payment of the work as fast as it progressed, referring to this same portion of the work mentioned by Elwell.

Richardson did not carry out the promises he made to the directors, *under the influence of which* the bonds were voted. The contractors for building this portion of the road were left unpaid and the work abandoned. The total amount as shown by his account advanced for the *purpose of construction and equipment* was less than $16,000. It must be remembered that the item under date of Feb. 22d, 1876, "Cash, J. A. Elwell, on acct. iron contract, $5,000.00," was not advanced by him, but was a claim due to Elwell which Richardson bought of Elwell for $2,500, and which Elwell claims has not yet been paid. Under *the circumstances* I do not think Mr. Richardson is entitled to hold

the three hundred bonds as collateral security for any amount."

[Now there runs through all this, a thread of *advocacy*. It is by the undisputed proofs, advocacy, based on *half* truths and no truths.]

There is *no* evidence that Aug. 3rd, 1875, "the prospects of a foreign loan *had disappeared*." It was that summer (July 26th) that Sickles in Paris had changed his father's 250 bonds, held collateral to his $100,000 loan, into 143 bonds bought, of McChesney, with 20 more added as a promoter's fee; *because* Sickles (engaged in helping McChesney) believed in a near prospect of placing the mass of bonds (R. 692 to 696) in Europe. It was in *November*, 1875, that "prospects disappeared." (Folio 1647.)

Aug. 3d, 1875, McChesney had not been "*recalled;*" that was *ordered* to be done Oct. 11–16, 1875. (Folio 1878 and 1882.)

Nelson's *talk* with Richardson (and Kelly) "in Aug., 1875," was also colloquium (R. 704) "*Just before* entering into that last contract" That last contract was August 12th, 1875 (R. 708 and 709) and nine days *after* the 300 bonds were voted to Richardson, *not* "for the purpose of *construction* and equipment", but as security for "the sums to be hereafter advanced by him, for purposes *of extension* and equipment of the road, as well as advances made by him, *of every nature whatsoever*."

Now what moved this referee to isolate and recite this: "The total amount, as shown by his account, advanced for the purposes of *construction* and equipment, was less than $16,000."

Neither is it true in even this narrow sense. See the account. (R. 996.) It shows from Aug. 14th, 1875, to July 5th, 1876, (and July 8th, 1876, Richardson withdrew

from all connection with the company, and started on his memorable campaign in pursuit, through the courts of, just advanced money and interest — not services) that his total advances, excluding interest and excluding $4,900 rental of his rolling stock, were $34,667.38.

The "*issued*" bonds, "autumnal leaves that strewed the vales of Vallambrosa" netted in the court below 17 48–100 per cent. of the amount decreed due to each bond holding claimant. Of this $34,667.38 $17,467.11 went into "construction" (apparently, for it is impossible to distribute every item). "Estimates and Nelson," which as he was the only contractor is apparently identical, got $9,000 of this $17,467.11, while $13,772.86 went to redeem 1105 bonds pledged in London; from the danger of passing into *a bona fide* ownership, and thereby reducing by *more than one-half* the sum obtained for each bond, decreed as allowed.

This redemption was the end originally sought by Richardson in co-operation with the "Philadelphia parties," and though in the ardor of the struggle to save as much of his advances as he was advised he lawfully could; this end was "rough hewed," yet "the divinity that shapes our ends" (in this case some feeble minded lawyer) kept Richardson *out* of the shoes of the London pledgee, and gave the benefit of this redemption to all holders alike, subject to a claim for equitable salvage Richardson makes.

Finally, the master finds that "under *the* circumstances" (whatever those are, hid away in the master's mind) "I do not *think* Mr. Richardson is entitled to hold the three hundred bonds as collateral security for *any* amount."

EXCEPTIONS.

The exceptions, not hereinbefore cited, applicable to the foregoing general discussion, are the *sixth*, *seventh*, *eighth*, *ninth*, *tenth*, *fifteenth* and *twentieth*. (R. 256 to 259.)

To give this court easier reference than does the lengthy record, all of appellant's exceptions are re-printed in this brief as APPENDIX A.

There is also attached to this brief as APPENDIX B some argumentative suggestions made by appellant Henry Day in person; a member of the legal firm of Lord, Day and Lord, New York city, with the master's report and portion of the proofs, but not the printed record before him.

"HE THAT ASKS EQUITY MUST FIRST DO EQUITY," (R. folio 439.)

The *caput mortuum* of this maxim, distilled from the evidence by the master's report, is that equity will *punish* Richardson for something wrong he tried to do by *depriving* him of his *contract* rights.

This is novel doctrine to us. We had thought that equity did not punish, but contented itself with *preventing* wrong doing; *when properly invoked*. The wrong doing seems to take this shape in the master's report, plus the undisputed facts.

1. Richardson held under his contract 1245 full paid shares of stock, and by means of this stock he became

(A) An officer of the company and influenced his associates in their official action had with and without his presence and co-operation.

In a characteristic letter he thinks (R. 1213) he is "receiver, advancer, head cook and bottle washer," etc. All the same he is, *in fact*, mere clay in the hands of the Wolverine potters.

(B) Aug. 3rd, 1875, (beginning with the master in his

hunt for wrongs) he promised his associates (and Nelson) further assistance toward the completion of the road so far as Lake View, and gave it.

(C) And so he procured 300 more bonds to be voted him, as collateral; in number *more* than his associates, and more than the general creditors, and for "services" who they all had two for one (except Nelson, who asked for, and got none) while he had three for one.

(D) He made no halt in his advances. At the Oct., 1875, meeting, he agreed to continue dollar for dollar with the "Philadelphia parties," in cash, up to $222,000; (R. 990) *provided* they, the next largest holders of bonds collateral, would equal *his cash.* This required of them $100,000 and of Richardson about $80,000. He did "kick" vigorously, when he found them putting in but one-third of the agreed sum, and that, by endorsing the Co. notes at 8, 11 and 17 months, 10 per cent., with one-third of those, undiscountable because worthless (master's report R. 182 and 183) a scheme arranged by the Wolverine potters, *after* he had left this meeting and gone home to New York. (F. 1885.)

(E) All subsequent directors proceedings, so long as Richardson was an officer, were but the beginning of the inevitable end — foreclosure and distribution; and no wrong doing is imagined, except, that Richardson and his associates, excluded president Craw (censured for nsing the Co. funds for private purposes) and European bond seller McChesney, ~~were refused~~ from participation in a stockholders meeting, except on the basis, taken by Ferry and Nims in Oct., 1875, of so many shares of their *subscribed* stock, as the 5 per cent. paid in, would make full paid. (R. 823.)

(F) He tried to get the "Philadelphia parties" to advance one-half the money needed to redeem the 1105

Stevens London pledged bonds, through his banker, Eugene Kelly & Co. of New York. They replied (R. 650) no! send us your half and we will do it through Drexel & Co. of Philadelphia. He then, April 13th and June 26th, 1876 (R. 996, 997) used $13,772.87 of his own money, and got them back into Eugene Kelly & Co's. hands, and afterwards allowed them to be returned to the company.

(G) At the general putting of claims in order, and giving out of bonds two for one, preparatory to foreclosure, June 8th, '76, he had through his associate directors, (made so, most of these, from his stock) notes for his money, as it was shown on the books of the Co. (R. 997) to have been actually received, and so far as *he could* give it direction, *used* to give value to the mortgaged property.

Notes had been before (Aug. 3, '75) voted to be given him for rental of his rolling stock. His account stood just before the October 1875 meeting at $142,794.98. It is *now*, July 5, '76, $185,588.19 (R. 996, 997) principal and interest.

(H) July 17, '76 having now no official connection with the company, he sued on his notes, by summons attached Aug. 11, '76, (R. 905) got judgment, (R. 900 to 909 and 456 to 465) Aug. 12, '76, and on execution sold, Aug. 19, '76. 2974 (R. 998) of the "unissued" bonds, including the 1105 redeemed from Stevens London pledge, and took *nothing* by such sale.

The Sheriff had seized and took into his possession, but these 2974 attached bonds (R. 643, 644 and 998) though it seems, he advertised to sell 3574 (R. 598) but as at the same sale, he had before arranged to sell and did sell for Richardson with intent to close out the pledge, his 600, on the day of sale produced, bought in and carried away, by Rich-

ardson; it is probable, that he included these 600 by mistake, in his execution sale notice.

The 2974 remained for some time after the sale, in the Sheriff's possession, because of controversy over his claimed fees and poundage $4,144.57 (R. 909). This was at length compromised, and paid by Richardson.

And as detailed by his attorney Davidson (R. 584 to 602), these 2974 then came to his exclusive possession. The 600 he had had continuously after Aug. 21, '75, (master's report, R. 199, 200.)

(I) Nov. 15, '76, the trustees began, in the court below, the foreclosure, whereby the Michigan court acquired anterior and superior jurisdiction of the subject matter—all bonds claimed—notwithstanding;

(J) Dec. 23, '76, Gen. Sickles and the "Philadelphia parties" sued Richardson, the railroad company and its trustees in the Supreme Court, city and county of New York. The record is in evidence with the testimony (R. 836 to 1042) and again (R. 419 to 456, without the testimony).

In this record Secretary Elwell, as witness, remembered for Richardson. In the Michigan record having experienced a change of heart, he remembered for Sickles. There was a receiver appointed by Judge Donahue, who took the 2974 bonds in a wooden trunk and the 600 in Richardson's tin trunk into his possession. They were so kept separate. Judge Donahue made findings and gave judgment (R. 863 et seq.) which adjudged the whole 3574 bonds to be null and void and of no effect; enjoined the trustees (though they had appeared and pleaded the prior and superior jurisdiction of the Michigan court) from recognizing their validity and ordered them by "some proper mark" to be cancelled, etc., etc.

Richardson appealed to the general term, where (of course) this judgment was vacated, (March 17th, 1881, R. 1041) and the case was dead.

Afterwards the order appointing receiver was discharged, and the bonds ordered returned to Richardson; subsequently modified by consent, so as to transmit the bonds (R. 74 to 79) direct to the Michigan Court, as *"exhibits of Benjamin Richardson"* (R. 74) 2974 in the wooden trunk, and 600 in the tin trunk.

These are the "wrongs," which Judge Donahue *punished* by annulling all Richardson's *contracts*; depriving him of his 600 bonds collateral, leaving him with a worthless judgment for near $200,000 advanced in an honest, though exceedingly foolish effort, to breathe the breath of life, into the dead carcass of a wild cat Railroad.

The master and the court below were 1-3 more lenient in their punishment. They repudiated and annulled only 2-3 of his contracts, by permitting him to keep 200 of his bonds.

THE DECREE.

It is not for me to say, why the court below did so decree. I can only surmise, as this court can, having examined the record; but this appears:

1. He was buried under dead loads of immaterial record.

2. The master's partial and argumentative report must have left an unfavorable impression, which his physical strength was not equal to removing, by patient and thorough examination, but: his decree (R. 299) giving "13, Benjamin Richardson and his assignee Henry Day," a lien on 200 bonds numbered 3001 to 3200 amounting to $374,904, and subsequently (R. 360) corrected to $330,725, as collateral to $273,282.87 of debt money and its interest ad-

vanced, is erroneously inequitable and unjust, to the appellants. The amount finally decreed to and received by these appellants was (R. 358) but $57,810.73, while his associate officers, received for naked *services*:

Nims $3,213.62, solicitor; Ferry $5,088.25, treasurer; Elwell $1,339.11, secretary; Green and bond trustees and their associates $3,604 31. (R. 358.)

And this is as appropriate place as any, to challenge the attention of this court to another instance of the partial methods of the master's report and the decree: *for* the trustees' complainant and *against* Richardson, covered by exception *twenty-second* 9th, 10th, 11th, 12th and 13th clauses. (R. 259, 260.)

At (R. 541) Mr. Ashbel Green testifies and produces bonds saying, "these two bonds" (No. 4810 and 4811) "with nine others, namely, No. 4801 to 4809, were *given* to me and William Bond for services as trustees under the mortgage for signing the certificates on the bonds, being at the rate of one dollar for each bond, per each trustee, payable in bonds, and the said eleven bonds were thereafter distributed as follows"—the distributees by their solicitor produced and put them in as exhibits. (R. 564.) The master's report on these (R. 209) is as follows:

"Ashbel Green claims absolute ownership in two bonds, Nos. 4810 and 4811. These bonds are part of the bonds *agreed to be turned over* to the trustees for services in reference to the bonds and mortgage for their compensation in certifying the bonds. The whole number of bonds so delivered to the trustees were eleven, and have been proved as follows:

Ashbel Green,	Nos.	4810	and	4811
William Bond,	"	4801	"	4805
C. B. Alexander,	"			4806
H. M. Alexander,	"	4807	"	4808
J. B. Cook,				4809

I find that Ashbel Green is entitled to participate in the fund arising from the sale to the amount of:

Principal - - - - -	$2,000 00	
Interest to Nov. 1, 1882 - -	1,749 04	
	$3,749 04	
William Bond,		
Principal - - - - -	$5,000 00	
Interest to Nov. 1 - - - -	4,372 60	
		$9,372 60
C. B. Alexander,		
Principal - - - - -	$1,000 00	
Interest to Nov. 1, 1882 - - -	874 52	
		$1,874 52
H. M. Alexander,		
Principal - - - - -	$2,000 00	
Interest to Nov. 1, 1882 - - -	1,749 04	
		$3,749 04
J. B. McCook,		
Principal - - - - -	$1,000 00	
Interest to Nov. 1, 1882 - - -	874 52	
		$1,874 52

Now aside from the evidence of Mr. Green above quoted, that these bonds "were *given* to me for services:" There is not *a scintilla* of evidence in the record, that tends to prove these bonds "*agreed* to be turned over for services" as the master finds.

There was written evidence before the master, over the

signature of Mr. Ashbel Green, in the Ferry exhibits, that reads as follows: (R. 670) "I have *retained* bonds Nos. 4801 to 4811 both inclusive (11 bonds) for Mr. Bond and myself. ASHBEL GREEN.

Nov. 14. 1874.

Ex. C referred to in deposition of E. P. Ferry, J. W. Champlain, special examiner."

Evidently in transmitting to the treasurer, the closing numbers of the certified bonds, the trustees "retained" what they believed right, for services; which "retaining" was not, in the proceedings of the board of directors, brought to their attention. There was an *apparent* over-issue (F. 1521) not *clearly* explained. (R. 632 and 633.)

The point however, of all, this is:

Green and Bond, officers of the Co. (trustees) without apparent official authority "retained" of the bonds in their peculiar custody certain bonds for their services. The master finds this *a sale*, and them to be "bona fide *purchasers* and holders of bonds." (R, 217.)

Richardson also an officer of the Co. the master finds "retained" (under express written official authority) of the bonds in his official custody, certain bonds, as collateral to money advances; this retaining, the master finds *wrongful and void*.

FURTHER EXCEPTIONS.

The resulting product, whether Richardson be ruled pledgee of 600 bonds, or absolute owner, either by lawful sale and purchase of the pledge as collateral, or its sale and purchase in execution, being so nearly the same; questions covered by exceptions *eleventh*, (R. 257) *thirteenth* and *fourteenth* (R. 258) that appellants' counsel, contents himself with calling attention to such exceptions, believing

that no discussion thereof, other than that had, will in any way aid the Court.

THE TWENTY-FIRST EXCEPTION.—(R. 259.)

Is addressed to the finding, that Sickles was a good faith purchaser of 163 bonds, and Stevens of 32. It is conceded that Sickles so holds 143, that as to the other 20 he holds those for *promoters' services* (such as shown) and that Stevens' 32 were also in part for promoting services, the value of which is no where shown, fixed, nor agreed. That it is inequitable to allow unadjusted and disputed services, to come in on equality with money loaned, without which, services could have received nothing.

Reference is made in this regard to master's report (R. 202 and 203 Sickles; and 203 Stevens) as to Stevens' claim the master finds that the 32 bonds were "sold to him in consideration of an indebtedness due, *and* to induce him *to consent* to the return of the 1105 bonds" pledged; this indebtedness was paid in full $11,063.16, cabled by means of Richardson's advances. To affirm such a "sale" is unconscionable. See the testimony.

For Stevens (R. 465) Geo. W. Tice produces bonds; knows nothing.

Elihu Root (R. 466) produces 32 coupons of May '76, protested: same Nos. as bonds No, 701 to 702; and exhibits A. and B. mostly the work of Elwell.

Sickles (R. 470 to 474) testifies for himself; also (R. 692 695.)

McChesney (R. 575 to 584) testifies the meeting of the board where foreign bond disposal was considered, was Jan. 20, 1876. (R. 817 to 821.)

There appears therein, no authority for Elwell's telegraph in March, 1876, to Stevens; Ex. A. referred to in Root's testimony cited *ante*. At the meeting of April 21,

1876, (R. 825) the secretary had instructions, touching return of the 1105 bonds through Eugene Kelly & Co.

An examination of this testimony is requested.

EXCEPTION TWENTY-SECOND. (R. 259.)

Clause 1, 2, 3, is directed to the question, whether bonds voted as *late* as July 8th, 1876, two for one, as collateral for officers' (solicitor, treasurer and secretary) *services*, should participate in the distribution of foreclosure sale proceeds, on *equality* with money loaned.

SICKLES.

Appellant in No. 1074 and whose appeal, unless advanced by order of this Court, cannot now be heard. On the hearing below, by reason of his buying of bonds in Europe, claimed priority of payment, especially over officers of the road holding bonds as pledgees for advances.

Appellants Richardson and Day in No. 181 resist this claim. Neither the master nor the decree below recognized it. When heard, appellants in No. 181 expect to file points in defence of that claimed priority.

THOMAS M. NELSON AND NELSON & SOULE, GENERAL JUDGMENT CREDITORS, WITHOUT SECURITY, *but with a permitted (so called) levy on property;* to be undisturbed in the custody of the receiver.

They are appellants in No. 947 and 1027 in which, to now obtain a hearing, requires of them pre-payment of their share of printers and other fees, not now (Jan, 3, 1889) paid and the advancing of their numbers.

They claimed below, priorities, which the master allowed, and the decree did not.

Here, appellants in No. 181 resist their claim, and shall expect to be given sufficient time, to print and file points in defence.

LAW.

As the grievance of the appellants, is, that the Court below, decreed out of their pockets, 400 of the pledged bonds, which they thought they had there, safe under the constitutional ægis of honest contract obligation, I have not thought "to bring coals to New Castle" by citation of authorities or quotation of the elementary law, that is thought to correct such procedure.

I have contented myself with an effort to state the material facts, easily verified by the record.

I now submit this appeal, in the faith, that if this impartial and learned tribunal cannot see a way to return these 400 bonds, it must after all, be, because equity *does punish*, the appellant Richardson's earnest, perhaps greedy, certainly badly advised legal struggle, to get back his money, actually and foolishly loaned; by taking away from him (and his assignee) two thirds of it, and giving some to the other lending fools in the enterprise, and some for the "services" of those, who worked both sets of fools (with the help of equity) out of their money.

L. D. NORRIS,

Of counsel, for appellants Day & Richardson.

Grand Rapids, Mich., January 3d, 1889.

EXHIBIT A.

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division—In equity.

ASHBEL GREEN and WILLIAM BOND, Trustees, Complainants, vs. CHICAGO, SAGINAW & CANADA RAILROAD COMPANY, Defendant.	Foreclosure Bill.

In the matter of the report of John W. Champlin, Special master:

Come now, within the time for this purpose by the court allowed, Benjamin Richardson and Henry Day, intervening claimants of the defendant's bonds, and by Norris & Uhl, their solicitors, except to the reports of the said special master, filed herein on the sixth and twenty-third days of November ultimo, in this, to-wit:

First: For that said master has erroneously found as matter of fact,

That Benjamin Richardson was elected treasurer of defendant to succeed Edward P. Ferry, such election to take effect as soon as his predecessor's "accounts as treasurer" should be adjusted by the executive committe;

Whereas by the only and undisputed evidence of the defendant's book of records, he should have found as matter of fact, that such election had effect only when said predecessor's "accounts as treasurer" should have been examined and settled, and the obligation said predecessor had made personally, for the benefit of the company, should

have been settled or said predecessor relieved therefrom, which was never done.

Second: For that said master has erroneously found as matter of fact.

That nothing whatever was paid for 1250 shares of defendant's stock, issued to Richardson, or in his behalf on or about October 11, 1875, in pursuance of the Seventh clause of the contract of date March 31, 1875, between him and the defendant.

Third: For that said master has erroneously found as matter of fact,

That the secretary, Elwell, and the treasurer, Ferry, did not carry out the instructions given by the defendant's board of Directors, at their meeting of July 5, 1875, touching the deposit with said Richardson of one hundred of defendant's bonds, in accordance with the resolution of the defendant's board of directors, of that date,

Whereas, From the whole evidence before him, which was undisputed he should have found as matter of fact, that the secretary and treasurer did carry out the instructions aforesaid.

And further, from the evidence taken by the said Richardson & Day since the filing of said master's reports, and filed herein by the order of this Court, and to be heard and considered on the hearing of these exceptions, it further fully appears that said secretary and treasurer did in fact carry out the instructions.

Fourth: For that said master has erroneously found as matter of fact,

1st, That "on August 3, 1875, Mr. E. P. Ferry resigned his office as treasurer " (of defendant)" to take effect when he should be settled with.' "

There is no evidence to support this finding.

2nd. That "Richardson was at the same time elected treasurer, to take effect as soon as Mr. Ferry's accounts were adjusted, by the Executive Committee."

There is no evidence to support this finding.

Fifth:—For that said master has erred in not finding, as matter of fact, whether, referring to the last above finding of fact, Mr. Ferry's accounts were or were not adjusted by the Executive Committee.

The finding of said master, "This"—the adjustment of said Ferry's accounts by the Executive Committee—"appears by the treasurer's journal, page 18, to have been done on the 16th day of August, 1875," is not finding of fact, and is excepted to as indefinite, uncertain and insufficient whereon to deduce conclusions of law. If held to be finding of fact, it is excepted to for that there is no evidence to support such finding.

Sixth.—For that said master has erroneously found as matter of fact.

That "on or after October 11th, 1875, Richardson gave to E. P. Ferry, treasurer, the following receipt:

Received of Edward P. Ferry, treasurer of the Chicago, Saginaw & Canada Railroad Co., twenty-two hundred and eighty-nine (2289) of the first mortgage bonds of the company, numbered as detailed by the memorandum above, dated New York, Aug. 20, '75, and signed by O. W. Child and M. J. Baney, placed in my custody as chairman of the Executive Committee of said R. R. Co. in accordance with the resolution of the Board of Directors passed Oct. 11th, '75, for custody, disposal or sale."

"BENJAMIN RICHARDSON."

There was no proof before said master of the execution or delivery of said paper by said Richardson.

Seventh: That said master has erroneously found as matter of fact and law combined.

That said Richardson under a resolution referred to by said master as on page 51 of the defendant's records, received into his possession as chairman of the defendant's executive committee, with other bonds, the bonds now claimed by him numbered 3201 to 3600 inclusive:

So far as such finding is of fact, there is no evidence to support it; so far as it is of law it is erroneous

In this connection the said master further reports as follows: "So it appears that the bonds voted to Richardson as collateral, on the 3rd day of August, 1875, being 300 in number, were not, in fact, delivered to him under that vote."

The same objections and exceptions are made to said last recited paragraph of said master's report, as is herein made in the "third" exception.

Eighth: That said master has erroneously found as matter of fact,

That "these bonds" (referring to the 300 voted August 3rd, 1875,) "remained in the hands of Ferry" (treasurer?) "until on or after Oct. 11th, 1875, and were then delivered to Richardson."

There is no evidence to support this finding of fact.

Ninth: That said master has erroneously found as matter of fact,

That "after the 2289 bonds came to Richardson's possession, under the above receipt" (Oct. 11th, 1875,) "he selected out four hundred of them numbered 3201 to 3600

inclusive and took them into his own individual possession."

There is no evidence to support this finding of fact.

Tenth: That said master has erroneously found the following matter of fact and law combined:

"I find that the company" (defendant) "never ratified Richardson's unauthorized act in severing the four hundred bonds from the bonds he received as chairman of the Executive Committee, for custody, disposal or sale. I find that the bonds numbered 3201 to 3600, inclusive, have never been delivered by the company to him in pledge as collateral security for moneys advanced, that they came to his hands as unissued bonds belonging to the company, which he held in custody as an officer of the company." Whereas said master should have found from the evidence, under the rules of equity pertinent thereto,

That said 400 bonds were delivered to said Richardson by the company in pledge as collateral security for moneys advanced; that they did not come to his hands as unissued bonds belonging to the company (defendant); that he never held these bonds in custody as an officer of said company; that he never received them as chairman of the executive committee for custody, disposal or sale; that the act of receiving or taking into his possession of said four hundred bonds was authorized by said company and has been ratified and confirmed.

And that if so much of said finding as is matter of fact, is fairly deduced from the evidence by said master, his conclusion of law divesting said Richardson of all equitable lien on said four hundred bonds is still erroneous, partial and inequitable.

Eleventh: That said master has erroneously found the

following matter of fact and law combined:

"I find with the exception of 200 bonds which had been delivered to him (Richardson) as collateral security, all the bonds sold at the Sheriff's sale" (meaning the sale in the case of Richardson vs. Defendant, had in New York City, August 19, 1876) "were unissued bonds of no legal or binding obligation against the company, and were not subject to levy and sale on execution. That by selling and bidding off the 200 bonds in the manner and under the circumstances disclosed by the evidence" (there is no other finding of this manner and these circumstances, than that they were sold at public anction by the sheriff for $50 a bond) "he did not derive an absolute ownership therein or any greater rights than he before had as pledgee.

Whereas, said master should have found and held,

That the 400 bonds numbered 3201 to 3600 inclusive, and the 1105 bonds redeemed by Richardson as found by the master, were not unissued bonds, but were lawfully issued and put upon the market by the defendant and are and were of binding obligation against it; that they were subject to levy and sale on execution; that said Richardson did in fact and law acquire absolute title and ownership, by his said purchase at said sheriff's sale, to and of the 200 bonds first held by him as collateral, the 400 bonds next held by him as collateral and to and of the 1105 bonds redeemed by him as found by said master.

Twelfth: That the said master has erroneously refused to allow upon the evidence and the facts by him found, to the said Richardson, pro rata equitable salvage lien upon the 1105 bonds redeemed by said Richardson to the resulting benefit of all.

Thirteenth: That the said master has erroneously wholly disallowed to said Richardson his claim as pledgee

and purchaser at sheriff's sale in closing out such collateral bonds for any amount of 400 bonds—numbered 3201 to 3600.

Fourteenth: That said master has erroneously disallowed to said Richardson his claim to defendant's bonds numbered 3201 to 3600 inclusive, as owner and purchaser at sheriff's sale on closing out such collateral bonds.

Fifteenth: That said master has erroneously found as matter of fact,

That August 3d, 1875, "the prospects of a foreign loan had disappeared, McChesney (defendant's attorney in fact in Europe) had been recalled."

There is no evidence to support this finding.

Sixteenth: That said master has erroneously found as matter of fact,

That "the 300 bonds were voted to him (Richardson) on August 3d, 1875 upon the following considerations, as detailed by the witness John A. Elwell, then secretary of the company:

"Mr. Richardson at that meeting spoke in favor of the extension of the road to Lake View, promised to render further assistance to the road financially toward the completion and the equipment of the road to that point, to Lake View, that was the contemplated terminus at that time. He said in substance, 'I will stand by the road and furnish money, provided you will secure me in giving me more bonds.' Finally made a proposition that if the company would authorize the further delivery to him of three hundred additional bonds, making six hundred in all, that he would furnish money for the completion and equipment of the road. The directors having taken some little time to consider Mr. Richardson's proposition, consented that a resolution should be passed in his favor, granting

the further issue of 300 bonds to secure him for such funds, as he might thereafter advance for the purpose of the extension and equipment of the road."

The evidence and the whole of it shows that this "detailed" statement of the witness Elwell was not the consideration for which the 300 bonds were voted to said Richardson August 3rd, 1875.

Seventeenth: That said master has erroneously found as matter of fact,

That "Richardson did not carry out the promise under the influence of which the bonds were voted."

This finding is wholly unsupported by any evidence.

Eighteenth: That said master erred in the following mixed finding of law and fact,

"Under the circumstances I do not think Mr. Richardson is entitled to hold the three hundred bonds" (voted August 3rd, 1875,) "as collateral security for any amount."

Such finding gives no basis of exception in that the counsel of said Richardson and Day have no means of knowing from said report "the circumstances" under which the master "thinks" said Richardson is not entitled to hold the said 300 bonds as collateral security for any amount.

Nineteenth: The said Richardson and Day further except to so much of said report as considers the claim of said Richardson and Day as his assignee in that,

I. Said report is largely argumentative.

II. The findings of law and fact are commingled and confused.

III. In its use of such words and phrases as "It appears," "It must be remembered," "I think," "I do not think," and "claims," as designating and qualifying the

facts necessary to be found absolutely in order to an orderly review of the law deduced by the master therefrom.

Twentieth: In that the said master's report is partial and unequal, in this to-wit:

He allows E. P. Ferry, treasurer of the defendant, to hold 19 bonds as collateral, upon a state of facts in all respects similar to those upon which he refuses to allow Richardson one hundred.

Twenty-first: In that said master has erroneously found as matter of law from the evidence, that Daniel E. Sickles is a good-faith purchaser of 163 bonds, and entitled to prove them to the full amount of principal, $163,000, and interest, $106,541.26.

And that Benjamin F. Stevens is a like good-faith purchaser of 32 bonds, and is entitled to prove them to the amount of $32,000 principal, and $19,247.20 interest thereon.

Twenty-second: Further exception is made to the allowance by said master, to the following named persons the following named amount of bonds and interest, as collateral to the following amount of debt:

1. Fred A. Nims, 12 bonds; principal, $12,000; interest, $10,494.24; debt, $6,000; interest, $2,651.83.

2. John A. Elwell, 5 bonds: principal, $5,000; interest, $4,372 60; debt, $1,404.16; interest, $620.53.

3. Edward P. Ferry, 19 bonds; principal, $19,000; interest, $10,461.02; debt, $9,312.22: interest, $4,115.64.

4. Thomas White Ferry, 60 bonds; principal, $60,000: interest, $52,471.20; debt, $20,000; interest, $13,410.61.

5. H. Hodgson, 10 bonds; principal, $10,000; interest, $8,745.20; debt, $5,000; interest, $3,949.99.

6. P. Sawyer, 10 bonds; principal, $10,000; interest, $8,745.20; debt, $5,852.01; interest, $3,255.06.

7. A. L. Bonaffon, 4 bonds; principal, $4,000; interest, $3,498.08; debt, $1,833.32; interest, $698.50.

8. J. R. Casselbury, 3 bonds; principal, $3,000; interest, $2,623.56; debt, $1,000; interest, $410.

Exception is taken to the master's allowance of the following number of bonds to the following named persons as absolute owners thereof:

9. To Ashbel Green, 2 bonds; principal, $2,000; interest, $1,749.04.

10. To William Bond, 5 bonds; principal, $5,000; interest, $4,372.60.

11. To C. B. Alexander, 1 bond; principal, $1,000; interest, $874.52.

12. To H. M. Alexander, 2 bonds; principal, $2,000; interest, $1,749.04.

13. To J. B. McCook, 1 bond; principal, $1,000; interest, $874.52.

Twenty-third: That said master has erroneously found as matter of fact and law, from evidence and papers before him, that

1st. Before any distribution is made to the holders of bonds out of the proceed of the sale of the mortgaged premises, $16,342.68 should be paid to Thomas M. Nelson and to Thomas M. Nelson and James B. Soule, to apply on their claims pro rata.

2nd. That as to the balance of their claims they are entitled to priority in the distribution to the claims of Benjamin Richardson, John F. Betz, J. Bower & Co., Charles P. Deitrich and John F. Betz, as assignee of Richard

Peniston, to the amount following, to-wit:

To Thomas M. Nelson, principal - - -	$5,573 12
Interest from March 5, 1877, 5 years, 7 months, 26 days - - - - - - - - -	2.206 30
	$7,779 42
To Thomas M. Nelson and James B. Soule, principal - - - - - - - - -	$18,113 44
Interest from March 5, 1877, 5 years, 7 months, 26 days - - - - - -	7.170 73
	$25,284 17

Whereas, said master should have found as matter of fact and law from the evidence and papers before him, that said Nelson and Nelson & Soule are entitled to take—if at all in this proceeding—only pro rata with other judgment and general creditors, and only such surplus as may remain to said defendant company, after the prior liens of all receiver's certificates shall have been paid in full, and all bondholders shall have been first pro rata satisfied and paid.

Twenty-fourth: Exception is made to the allowance by said master of $2,885.00 to the trustees, complainants; and of $1,667.97 to the trustee's solicitor F. A. Nins, the same having been allowed only upon ex parte affidavits, and being otherwise inequitable and unjust.

Twenty-fifth: Exception is made to the pro forma audit and passing of the receiver's account to September 1st, 1882, by the master.

Such pro forma audit and passing is not in compliance with the letter or spirit of the reference to him.

Lastly: Reference is made by said Richardson and his

assignee, Day, upon the hearing of these exceptions, and upon the question of the confirmation in whole or in part, of the said master's report, to the testimony taken [by the said exceptors under and by virtue of two orders of this Court of date January 11th, 1879, and December 1st, 1882], and filed in this Court and cause on the sixteenth day of December instant.

Dated December 22, 1882.

BENJAMIN RICHARDSON and
HENRY DAY, his Assignee,
By NORRIS & UHL, their Solicitors.

EXHIBIT B.

[Is mainly a discussion of the comparative equities of appellants Richardson, Sickles, Nelson, Nelson & Soule, all the appellants there are.

It is appropriate if the appeals No. 1074 Sickles, No. 947 Nelson, and 1027 Nelson & Soule are advanced and *now* to be heard.

It is also pertinent to the appeal of Richardson and Day No,181 now on hearing.

The Court below did not give Nelson and Nelson & Soule, the priority, the master found for them. They were remitted to the surplus, which was nothing (R. 298.)]

REMARKS UPON THE FINDINGS OF CHAMPLIN, SPECIAL MASTER, ALLOWING RICHARDSON THE SECURITY, OF ONLY 200 BONDS,—

By HENRY DAY, in Person, Assignee and Purchaser of B. Richardson's Interest.

The master in his report seems to have made three distinct points against Richardson :

1.—His actions are unconscionable and inequitable, and he thus raises equities in favor of appellants Sickles, and Nelson, and Nelson & Soule, and deprives Richardson of the lien of 400 bonds.

2.—He denies that Richardson received control of 400 bonds *before* Oct. 11, 1875, and that on that date or after he did not hold 400 of the bonds, as pledged.

3.—That the action of the board in giving Richardson notes on July 8, 1876, was not a ratification of its former acts in pledging 600 bonds.

We will consider these points in their order ;

First.—The master in his decisions, though invoking the principles of equity, has changed the legal and contract relations of the parties, to do what he considers equity. Look at Richardson's relations to the enterprise. He was not a projector. He came into it in March, 1875, the enterprise having been commenced in Dec, 1872. He came in about two years after the Philadelphia parties had put in their money, and about six months after Sickles had loaned $100,000 on a commission of 5 per cent. and 250 bonds as security. He came into a failing, if not dead enterprise, to save it and all concerned in it, Sickles among them. He came in as any other careful business man would have done, with the intention, openly avowed, to be secured beyond all question. His contract of March, 1875, shows how careful he was to be secured. He declared, as the evidence shows frequently, that he would help with money if they would give him bonds. He demanded more bonds every time he put more money in. It was fair for him thus to demand security,

for all were using his money to secure themselves, and he did as any prudent man would do, refused to put his money into a failing concern, to save others, without being safe himself. The inducement of large profits and security was held out to him to take hold of this languishing project. It was a fair bargain and not an unusual one under the circumstances. He put in more money than any other person on these inducements. It was taken out of him little by little, till he got in $185,000. He always came to the aid of the road in its exigency. He advanced money to take up the 1,105 bonds which were in danger of being sold in England. He advanced $25,000 to the Cleveland Rolling Mill Company for iron, when it was needed. He agreed to advance up to $222,000 if the Philadelphia parties would do the same. He furnished rolling stock, paid current bills, and was the only man in 1875 and 1876 who saved the whole enterprise from hopeless ruin. He devoted his time as director, managing director, and member of executive committee *without pay*, while Ferry, treasurer, is allowed 19 bonds for services and Sickles is allowed 20 bonds for his services in accomplishing nothing. The trustees of the mortgage are allowed 11 bonds and an allowance of $2,885 for doing nothing but sign. Nims, solicitor, Elwell, secretary, every one is paid for *services* but him. Every promoter is allowed the full amount of pledge held by him (two for one), except Richardson, who, being inveigled into the company last, having put in more money than any other, and thereby made the investment of every other party the better for it, is rewarded by taking away $400,000 of his security, which was openly and fairly conceded to him, as a condition of his loan.

This the master calls equity.

Look at the equities between Richardson and Sickles, Sickles had, through his father, Geo. G. Sickles, loaned the company $100,000 in October, 1873, before Richardson came in. His money was at stake. Richardson's money made his stake better. Sickles, when he learns this, and thinks the road is going on and the bonds to be sold, purchases 143 (with 20 as a promoters fee), in all 163 bonds for his $100,000. He thought he was making a good bargain. Richardson's money made his bonds better, and more reliable. He was buying the bonds at about 60 cents on the dollar. Is this more equitable than loaning money at 10 per cent. with ample security of three dollars in bonds for one? When Richardson took the bonds they were not worth anything without his money and efforts to help finish some part of the road.

The master has made the mistake of considering a large *amount* of *security*, demanded for a loan, as inequitable. This is a clear mistake. No man can be blamed for taking any *amount* of *security* on a loan at reasonable interest, if the transaction is understood and agreed to. His money benefits every creditor and bond claimant, and he only seeks it back again. But when a man *purchases* the securities of a road, at a great discount under pressure; here may be a chance for unfair dealing.

Contrary to all this, the master has given Sickles an equity over Richardson, in preferring the claim of Nelson and Nelson & Soule over Richardson, and not over Sickles; for the reason that Sickles was the purchaser of bonds, at a large discount and Richardson only loaned money on large security. His principle is radically wrong. He has reversed the equities.

Again as to equities between Richardson and Nelson and

Nelson & Soule. Richardson fairly and openly *contracted* in March, 1875, that he should loan money on bonds secured by a first mortgage on all the property. It was a legal and honest contract avowed to the world. The mortgage was recorded. He advanced his money on this understanding. Nelson's contract for R. R. construction was June 7, 1875, Nelson & Soule's August 12, 1875. They contracted to do work *without* any such lien, and agreed to look to the financial strength of the company for security,, they made their contract subject to the lien of the mortgage, and, as in all such cases, they no doubt asked a *larger price* corresponding to their risk. They could have asked for bonds to secure them, but did not. Now the master reverses all this. He cancels Richardson's legal contract and his lien, and substitutes Nelson & Soule without a lien, to the place of Richardson, who only asks the money he put in, and no profit. Why was not Richardson's money *loaned*, as good as Nelson & Soule's *contract* claims. What can be the occasion of such a reversal of all rules of law?

The master says, as between these bondholders who were directors managing its affairs and directing its operations, there exists a clear equity that these claimants should be paid, before the bonds of such promoters.

In the first place Richardson was not a promoter. He came in a few months before Nelson and Nelson & Soule did. But call him a promoter; what has he done that his legal liens, should be set aside? He must have in some way *wronged* Nelson and Nelson & Soule to raise such equities in their favor. What deceit has he practiced on them? what misreprentations has he made? Why should not Richardson get back the money he has paid as well as they their contract price; from whence come the equities which deprive Richardson of his liens, and substitute them

in his place? The record may be searched in vain for any reason. True, the master says Elwell testified that Richardson at a meeting Aug. 3, 1875, where 300 bonds were voted to him, promised to render *further assistance* in the extension of the railroad to Lake View. He said, "I will stand by the road, and furnish money, provided you will secure me in giving me bonds." This is the statement of a man not friendly to Richardson, from memory. It was simple conversation. But to show what the real agreement was, the directors after having taken time to deliberate, passed the resolution which expresses the real contract, found by the master's report.

The whole drift of this resolution shows that the company in order to get more money from Richardson, made large promises: to give 300 more bonds as security for *what had been advanced*, and for *sums to be hereafter advanced*, stating no amount, stating no terminus of Lake View. Such language cannot be tortured into any contract with the board to finish the road to Lake View; much less can any contract with Nelson & Soule be inferred from it, especially when taken in connection with the other resolutions of the same day, and with the agreement of Richardson presented to the board at its next meeting, Oct. 14, 1875, obtained from him by Elwell, which in substance was, that he, Richardson, would advance up to the amount of $222,000, if Philadelphia parties would do the same. This proposition was accepted by the board, and Richardson acted on it, advancing money as long as the Philadelphia parties did. Elwell says it was understood, that the last voted 300 bonds should cover these advances, so that it appears the board did not understand Richardson's language of the 3d of August as an absolute promise, to finish the road to Lake View. If they did, they

here, October 14th, 1875, changed the contract, by acting on Richardson's proposition of that date. The Philadelphia parties failed to advance more money and Richardson also stopped, but only after he had paid in, since Aug. 3, 1875, $40,568.69 principal. Was he not justified in so doing? Where is the equity in calling on him, the last to come into the enterprise, to furnish the money to finish this road for advantage of all other parties, and especially of Sickles, with others who were the *real* promoters?

This review shows Richardson to have more equity in his claims to the 600 bonds than any other bond claimant or creditor. He was last to come in and he made good the investment of all others by paying into the road the amount of more than $180,000 of principal and legal interest. He came to the aid of the company in its greatest difficulties; never sought anything but *security* for money put in; charged nothing for services, and as a result, the master takes from him two-thirds of his security; subordinates his claims for money lent, on a first lien, to those who had asked no lien whatever. This he does on the principle "that he who seeks equity must do equity!"

Again, Nelson's *first* contract was June 7th, 1875. Richardson at that time had fulfilled his contract of March, 1875, had gone beyond it, advanced $25,000 more than the $100,000 promised, and his lien on 200 bonds was complete and perfect. He had made no promises then of aid, and had never heard of Nelson or Nelson & Soule. How can any equities as against these 200 be raised in favor of Nelson & Soule and Richardson's lien destroyed.

The master seeks to evade the force of these facts by endeavoring from some casual conversations of Richardson reported by Elwell to *infer* a contract by Richardson with

Nelson, or some equitable obligation to furnish means to finish the road to Lake View. Nelson says that Richardson assured him in August, that arrangements had been perfected for payment of work as fast as it progressed. Is such casual conversation a contract? Was it so intended? Does it look like misrepresentation? Were there not arrangements made for more money? If such casual conversations are to be repeated by a contractor in his own favor, and a contract inferred from them, it would be a dangerous thing for anyone who holds securities of a railroad to talk. Can anyone say this conversation with Nelson was *before* the contract of Nelson & Soule of August was made; that it was relied on; that it was anything more than opinion?

It is worthy of note that *the argument* of the master's leading up to his rejection of 300 of Richardson's bonds stands only on conversations of Richardson, reported by Elwell and Nelson. On these conversations alone he decides that it is inequitable for Richardson to hold 300 of his bonds, and that Nelson should be substituted for, or take precedence of Richardson as to his whole 600. Again, if these conversations have any weight, how can they *justly* be used to displace Richardson's lien on 200 bonds which the master finds he lawfully held—long prior to the time this conversation was held?

Review all the circumstances. Is it not true that the master's report *sacrifices* Richardson's *loan* of $185,000 to make good Sickles' *purchase*, and the claims of *every other claimant*; perhaps because of Richardson's *inordinate haste to save* all he could from the impending wreck in July and August, 1876; *after* all his attempts to save the company had failed. Equity would go no further than to *arrest* his attempted efforts, if they meant an unfair ad-

vantage. But his attempts had ended. He had secured no advantage whatever, only met with greater losses in his illadvised efforts to get back his money.

Second.—Did Richardson receive into his possession as pledgee the 600 bonds.

A.—This considered on the facts as *they appeared* to the master, though subsequent proofs taken, under order of Dec. 1, 1882, *settles the question of delivery.*

The 600 bonds were lawfully in Richardson's possession, as agreed, August 21, 1875.

If the evidence of the different witnesses is taken up seriatim, there seems to be no question upon this subject, especially if Mr. Elwell is to be believed, the man on whom the master relies, to decide the equities of the case.

The first 200 bonds all admit that Richardson received.

As to the next 100 bonds, making 300.

Elwell being asked "Do you remember the occasion (July 5, 1875), of Mr. Richardson *receiving* $100,000 in bonds," said "I do," and then states that the resolution was passed authorizing the secretary and treasurer to deliver to Mr. Richardson $100,000 additional bonds as further collateral to him. Being asked why so many bonds were given to him (July 5th) at that meeting, he says, "it became necessary to *advance a further sum of* $25,000 to the Cleveland Rolling mill, and Mr. Richardson consented (in order that the company might receive the balance of iron), to make the advance, *conditioned* on receiving $100,000 additional bonds," No statement can be plainer than that he did receive these bonds as a matter of fact, and the company got his $25,000 in money and on *condition*, Elwell says, that they gave him 100 bonds as security. This was not inequitable; any man would be called foolish to lend

money to such a road, languishing as it was, without large or undoubted security. The wonder is that Richardson advanced any, under such circumstances.

Elwell says, that Richardson advanced $25,000 on $100,000 of bonds. All this shows delivery of the first 300 bonds, on a fair, plain contract, which the master seeks to avoid. If they were not delivered, equity and good faith demands that they *should be* for the $25,000 was advanced by Richardson on *condition* of their delivery.

In regard to the last 300 bonds, the evidence is also plain that Mr. Richardson received them as a pledge also.

These 300 more bonds were voted to Richardson, Aug. 3, 1875, at Muskegon. These bonds were in New York. Elwell being asked were they *delivered* to him, Richardson, as security under the resolution from among the unissued bonds in the possession of the treasurer says, "Yes, Mr. Ferry wrote *an order* I think to the Trust Company that Mr. Richardson might have *access* to the vault in which the bonds were kept, and gave him *the key* of the vault." Such an order as this, with the key, is in itself possession of the bonds in law, and this was followed by acts that nobody disputes, of Richardson separating these bonds afterwards from the others and claiming them as his own as a pledge, as he did, up to the time they were sold under execution. It is of no consequence *when* he separated these bonds from the others. The master finds he did it between Aug. 3, 1875, and July 8, 1876. The late evidence shows it to have been done Aug. 21, 1875. At whatever time he did it, his act was authorized, for he had the possession and the order of the company never withdrawn, so to do.

Elwell states very many times, that Richardson had these bonds in a separate tin box, presented the same to him to be counted, took them away from his office time and

again, presented them to him as collateral when he demanded payment of the notes; and the bonds themselves were referred to by number in the notes; *he testifies*, he gave to Richardson, on July 8, 1876. Thus they were pledged to him in writing (the notes) by action of an authorized agent of the company, whose action has never been disputed by the board.

It would be difficult to show by any kind of testimony more decisive proof of the equitable right to these bonds, so pledged and set apart from the others, and it must be difficult to conceive how the company could more plainly acknowledge by language or acts, that Richardson held the possession of them as pledgee. And again the company left them in his possession when he (Richardson) as managing director, July 8, 1876, gave up control of the *other* bonds, and Elwell, the new managing director, received them, yet made no claim for these 600 bonds as property of the company and as under their control; thus showing that Richardson held these bonds by the consent and resolution of the company and the order of its officers, in his possession, for his own protection. This act affirmed his possession of the 600 bonds.

It is very noticeable that in this suit, and all others referred to in the evidence, that not one of the parties, not one of the counsel even, opposed to Richardson's claims, have ever disputed his *possession* of the 600 bonds as pledgee. They have denied his equity, but not his pledge. The master has been the only one to discover, that Richardson never held but 200 bonds in pledge.

Let us now consider the master's newly found evidence; evidence never presented by either party, never seen by either party interested. It is founded on the signature of

B. Richardson (which was not proved) subscribed to a receipt, which might bear a different construction from the master's, or which might have been explained by qualifying evidence if opportunity had been offered. It is embraced in one paper found in the master's report; submitted after the *evidence had closed.* Richardson's counsel never saw it.

The points are, *first,* that these 400 bonds were in the *possession* of Ferry till Oct. 11, 1875, when they were delivered to Richardson; and, *second,* they were delivered to Richardson not in pledge, but as chairman of the executive committee. The master is clearly wrong in the first point. When the last 300 bonds were voted to Richardson on the 3d of August, 1875, Ferry, treasurer, wrote an *order* to the Trust Company to *deliver* these bonds to Richardson and gave *him the key to the vault,* (Elwell's testimony.) Ferry lived in Michigan and was then in Michigan. The bonds were in New York. This was the only delivery he could make. This was a change of possession, and thus Richardson had from August, 1875, legal possession.

But suppose they were not legally delivered to Richardson till Oct. 11, 1875. Does this *receipt,* signed by Richardson, *prevent* him from setting apart from that time and holding the 400 bonds as collateral to his loans? The master says yes. We say no. The master gives no reason for a decision, which sweeps away from Richardson $400,000 of bonds by a stroke of his pen.

We give the following reasons why Richardson could at any time after Oct. 11, 1875, set apart these 400 bonds to himself as pledgee.

1st. He had the order of the treasurer, of August 3d, 1875, to take these bonds as collateral, (Elwell's testimony,) and he had the *key* delivered to him. He

had also the resolution of the board, of Aug. 3, 1875, that he might take them, (master's report.) This resolution was a contract, on which the company and Richardson both acted, for Richardson advanced over $40,000 in money under the resolution, after Aug. 3. The authority for Richardson to take the 400 bonds was never revoked or modified in any way by the board. He then had a right, as custodian in Ferry's place, to do what Ferry was directed to do in August before, viz: to make a manual delivery of the bonds. He did afterwards, if not before Oct. 11, 1875, separate those 400 bonds from the others, and always held them and claimed them as collateral, until they were delivered by him, to the New York court's receiver's hands. The only answer which can be made to this is the *inference* which the master does not *state*, but which he apparently *acted on*, viz: that Richardson by signing the receipt of Oct. 11, 1875, *gave up his claim*, to take 400 bonds in pledge — substantially said he would *not* demand, but would waive his security by pledge.

Did *either party intend this*, is the important question on this receipt. We say, when all the surrounding circumstances are considered, this view of the meaning of the receipt is absurd, simply absurd, contrary to the whole drift and acts and instructions of either party.

At this very meeting of Oct. 11 to Oct 16, 1875, in Philadelphia, Richardson, instead of giving up his security, sought for more; 120 bonds as a bonus were, by resolution voted to him, *in his absence*, these he refused to take and never received. (Master's report.) He also at said meeting obtained a substantial endorsement of his lease of the road, *until he should have been paid principal and interest.* The company took a new contract from Richardson on Oct. 14, during the same meeting, with

reference to Richardson advancing more money, it being understood, as Elwell says, that Richardson *was to hold the 600 bonds which he had received already to cover his advances.* (Sickles' brief, p. 89.) Here the secretary Elwell, upon whose testimony the master relies so much as to what Richardson said at various meetings, says, taking the question and answer together, that Richardson had *already received the 600 bonds, and was to hold them* for security for other advances. Could this be possible if three days before, Richardson had given up his claim to 400 of them?

All the facts happening during the same meeting at which the receipt was signed, show that neither party expected Richardson was giving up his claim to 400 bonds. Richardson in signing the receipt gave and intended only a personal voucher to Ferry as treasurer, and for his protection as custodian of the bonds. Ferry had no right to act for the company in an agreement for Richardson to give up his bonds or the right to them, if Richardson wished or intended to make it. Such an important matter as this would necessarily have been a matter of action by the board, and appear on record in the company's minutes. If then Richardson did not mean by this receipt to give up his security of 400 bonds, and his naming them was not an inadvertence *as it was*, what does the receipt mean as applied to the 400 bonds? It means, first, that Ferry, treasurer, was relieved from responsibility, as to the custody of all the bonds, left with Richardson.

2d. That Richardson, assumed such custody.

3d. To dispose of them for such prices and on such terms as the executive committee might deem best, for the interest of the company.

What would this authority allow Richardson to do with the bonds?

1st. To sell this 400, which he could not as pledgee have done, without this authority. and to have taken out the amount due him from the price of the 400, and to have accounted to the company for the balance.

2d. "To dispose of the bonds as the executive committee may think best for the interest of the company."

The language of the receipt is for disposal *or* sale. This *disposal* was not sale.

Is not this language broad enough to authorize the committee to deliver the 400 bonds to Richardson as they had by resolution contracted on August 3d, 1875, to do, and as they had then directed their treasurer to do, the contract and order being still in force and without recall, protest or modification? *Was it not for the interest of the company to carry out their contract?* Was not this a disposal and a proper one? Suppose Elwell on Oct. 11, 1875, had been appointed chairman of the executive committee and he had given the receipt to the treasurer, Ferry, in the exact words of Richardson's receipt that day. Would he not have been justified and obliged to give the bonds to Richardson?

The terms of the receipt of Richardson are perfectly consistent with the theory of his taking and holding the 400 bonds as collateral to his loan, with power to sell the same and account to the company, retaining the amount due him.

This is done every day by pledgees in large commercial centers.

Still further to consider the receipt, which Richardson signed, as it is set out in the master's report, where he

states that he received 2,289 bonds of the company (including the last 400 pledged to him) and as placed in his custody "as chairman of the executive committee of said railroad company" in accordance with the resolution of the board of directors passed October 11, 1875, for custody, disposal or sale, and whether it negatives the position that he held these 400 as collateral to his debt. Besides the foregoing reasons there are other answers.

The first suggestion that will occur to anyone after considering all the testimony before mentioned, is that the receipt in its present form was simply a *mistake*, and is capable of being explained, when all the circumstances are taken into account, such as (1) that it was a long list of 2,289 bonds; that the list had been made for another purpose, and had been used previously; (2) that the bonds were not present with Richardson, when the receipt was signed; they were in vaults in New York, while the receipt was signed in Philadelphia; (3) the bonds were never counted seriatim, only contents of bundles estimated by two other persons, employed two months before by Richardson; (4) the bonds were not all counted or bundles showed; (5) all his acts show that it was simply a *mistake* in signing the receipt, including the 400 bonds in dispute, and that it could have been explained, had the master felt like making known *his* discovery.

But suppose there was no *mistake* in signing the receipt, there is nothing in the receipt contrary to the proposition that he could have taken them into his custody as chairman of the executive committee in accordance with the resolution of the board of directors, passed Oct. 11, 1875, for disposal, according to the best interest of the company, as before shown.

As to ratification:

3d. The master holds that the action of the board on July 8, 1876, did not ratify the former action of the board in pledging 600 bonds. The resolution of Ham of that day pledged to Richardson all the bonds he then held.

The master says that as no mention is made of *the number* of bonds in the resolution, and as the first 200 had been delivered to Richardson, and the 400 had not been delivered (although voted): he *assumed* that the 400 bonds had not been delivered up to this time, and he further *assumes* that the resolution referred only to the 200 bonds that Richardson first received.

The point we wish to make here is, that the bonds referred to in that resolution of Ham must have been the *six*, and not the two hundred.

If we can establish this, then we establish the whole claim. On the same day (July 8) it appears that the secretary of the company (Elwell) drew the three notes, amounting in the aggregate to about $186,000, due to Richardson. Elwell states, that he drew three notes *"in compliance with the resolution"* (*meaning the resolution of Ham above referred to,*) and he issued the stock notes, pledging 600 bonds, numbering them, for the sums mentioned in that resolution. This shows what the secretary, an officer of the company, understood to be the bonds referred to in the resolution. It is also to be remembered that at the time Elwell delivered these notes he was the managing director of the company, in the place of Richardson, for on this 8th day of July Richardson resigned as managing director, and Elwell was chosen in his place. Elwell was the executive officer of the company at this time, and especially directed by the resolution to give the notes.

Again, the action of the secretary and managing director of the company, who was directed to make the notes in compliance with the resolution, is decisive and binding on the company *prima facie*. It is the company's interpretation of its own resolution. It was reported on their minutes, and reported to the board at its subsequent meeting, and has been acquiesced in by the board ever since, and no person, not even the opposing counsel, has ever suggested that Richardson did not hold the 600 bonds in pledge, until the master has made the discovery. This action of the company's secretary in pledging the bonds, and the acquiescence of the board ever since July, 1876, with not a particle of evidence or a suggestion to the contrary, is decisive as to the pledge of 600 bonds, as a ratification of former action.

We have therefore the resolution of the company explained by the action of its secretary, and its managing director, and its own acquiescence in his action, plainly showing that it was the intention of the board to pledge 600 bonds when they referred to the bonds held by Richardson as collateral in this resolution.

Again, the action of Elwell as managing director in receiving the bonds held by and under the control of the former managing director of the company, after he was appointed managing director in place of Richardson, shows 600 of the bonds were with Richardson by consent of the company and as pledgee. That is to say, Elwell was requested to obtain the bonds belonging to the company and with the consent of the former managing director (Richardson) he did receive these bonds, namely, 2959 of them. He says it was recommended that the bonds should be taken from the bank and placed in my custody. "I had been elected director in Richardson's place, and Mr. Richardson

delivered the bonds over to me—*the bonds that he had in his custody as managing director formerly.*" It follows that he did not hold the 600 bonds as a managing director, and on the same page he states that he received 2959 bonds, and he (Elwell) nowhere intimates that he demanded any more, which he would have done if he had understood that Richardson retained improperly 400 of the bonds as a pledge.

Nothing can be plainer than the admission that 2959 bonds were *all* that Richardson held in his control as managing director.

This action was done by order of the board, and aquiesced in, no further demand having been made on Richardson.

Again, Elwell states frequently that Richardson had these 600 bonds in his possession; for instance, he says: "At this time Richardson had 600 bonds, which had *been delivered* to him as heretofore stated." This was on July 12, 1876, only four days after the date of the Ham resolution. He also says, on the 17th day of July, 1876: "Richardson had his box with him, with his bonds in it," and made a tender of *these collaterals.* This refers to the 600 he had just before spoken of.

He also says: "These *six hundred bonds,* up to 12th July, 1876, had not been in his (Elwell's) possession"—i. e., as secretary or managing director.

He says: "These bonds, 1854, were kept by themselves, in the vault of the Park Bank, and 1105 with the firm of Eugene Kelly & Co."—showing that on July 8, 1876, the day of the Ham resolution, they were kept separate from the 600 bonds.

He says positively that Mr. Richardson had these 600

bonds in his custody, because he counted them himself.

This was Aug. 11, 1876, showing that Richardson was allowed to hold them in pledge for more than a year without protest from any one, and it was a fact of common notoriety that he thus held them, for Sickles admits (page 49 of his statement), that he heard of it in the spring of 1876. It seems plain that at the time of the Ham resolution, July 8, 1876, Richardson had the 600 bonds in his control as pledgee, that the board and all the officers so considered it, and that they referred to 600 bonds in their resolution.

If this is so it disposes of the master's finding that R. does not hold the 400 bonds as pledgee.

Again, the importance of these Ham resolutions justifies a further examination of them in another light, to show that they referred to 600 instead of 400 bonds to be given or held by R. as collateral.

There are two resolutions; the object of the first is in its own language "Resolved, That the bonds issued to said Richardson by this company for said aggregate amount of $185,588.19 be and the same are *hereby ratified and approved.*" The object then was to ratify the issuing of certain bonds to Richardson for (to secure, it doubtless means) $185,588.19. The two points here are, what is the meaning of "issued," and how many bonds were referred to as issued? The master argues and finds, that as 200 bonds had been delivered to R., and 400 had not, although voted; that they (400 bonds) came to his hands as *unissued* bonds belonging to the company which he held in his custody as an officer of the company; that is to say, that *issued* means *delivery* to him in pledge as collateral security. This si not the whole meaning of issued. It means first

the various acts of the board of directors authorizing the disposal of the bonds, and then the delivery following.

It is *not candid* to say, when the board in the first Ham resolution speaks of bonds issued to R. they used the term issued with reference only to one resolution giving R. 200 bonds, and ignored the *two others* giving him 400 more. Why did they leave so important a matter in doubt? Is it not more reasonable to say, they applied the term *issued* to *all their previous acts* as a board, and their order to their treasurer to deliver the 600, and to their treasurer's act in giving R. an order for the bonds and the key to the vault? Is not this the fair meaning of *issued* in this rosolution?

But secondly, is there indication in the resolution of how *many* bonds they referred to by issue? It says bonds "for said aggregate *amount*" of $185,588 19-100. This means bonds issued to secure $185,588 19-100. The 200 bonds were issued to secure only $100,000 and no more. The board then refers to *other* bonds in addition to the 200 to secure the balance over $100,000. If they meant only the 200 bonds as *issued* they would have said bonds issued to secure the first $100,000, for there were no bonds, on the master's theory, issued to secure the $85.588 19-100. But they said bonds issued for said *aggregate amount* of $185,-588 19-100, meaning, in other words, bonds that had been voted by the various resolutions of the board, for the different amounts referred to in the first part of the resolution to secure the aggregate sum of $185,588.

It is not reasonable to suppose if the company intended to deprive Richardson of two-thirds of the security they had formerly voted him, and which he then held, they would not have so stated in this resolution. If they in-

tended to discriminate between the loans and votes of the board they would have said so.

Can *any candid man* say the board did not refer to the bonds then held by Richardson? Did he not at this time hold 600 bonds, claiming them as we have before shown, as even the master is compelled to find, had held them certainly since October 11, 1875.

What one of the directors understood about the number of bonds meant by this resolution is proven by the act of Elwell, then one of the directors, who on the same day in compliance with the direction of these resolutions, pledged the 600 bonds by number, and there is no evidence that any other directors thought differently.

What all the directors understood by the bonds mentioned in the resolution is shown by the fact that at the same meeting, July 8, 1876, they directed the secretary to obtain possession of the bonds under the control of the company. He did obtain them within a few days, but left the 600 with Richardson, and the board never have objected to this act.

HENRY DAY.

In person.

OCT 12 1859
JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1859.

BENJAMIN RICHARDSON AND HENRY DAY,

Appellants,

vs.

ASHBEL GREEN AND WILLIAM BOND, as Trustees, Exr., &c. et al.,

Appellees.

BRIEF AND ARGUMENT FOR APPELLEES SICKLER AND STEVENS.

HENRY P. [illegible]
for Appellees.

Evening Post Job Print.

IN THE

Supreme Court of the United States.

BENJAMIN RICHARDSON and HENRY DAY, Appellants, vs. ASHBEL GREEN and WILLIAM BOND, as Trustees, &c., *et al.*	No.

Brief of Counsel for Sickles and Stevens.

This is a suit in equity, commenced in the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, November 16, 1876, by Ashbel Green and William Bond, as Trustees, &c., complainants, against The Chicago, Saginaw and Canada Railroad Company to foreclose a mortgage made by said railroad company of its property to said Trustees May 21, 1873 (see printed record, pages 19 to 29), to secure the bonds of the company thereafter to be sold.

The questions litigated before the Master to whom it was referred to take proofs were as to the rights of various alleged bondholders and creditors to share in the proceeds of sale, and their priorities, if any, as between themselves.

After hearing the various parties at great length the Master's report was filed, and, although excepted to, was confirmed May 3, 1883, and a decree entered.

Subsequently this decree was amended so as to correct certain errors in the computation of interest, the amended decree being dated October 8, 1883.

Appeals to this Court were taken from the decree of May 3, 1883, by Richardson and Day, Sickles and Stevens and Nelson and Soule, and an appeal from the amended decree was taken by Richardson and Day.

At the last term of this Court the appeals from the decree of May 3, 1883, were dismissed for failure to lodge the transcripts in time, leaving the appeal of Richardson and Day from the amended decree of October 8, 1883, as the only one to be heard.

The statement of facts given by the appellants, Richardson and Day, in their brief on this appeal is controverted by counsel for the appellees, Sickles and Stevens, and it is therefore considered necessary in their behalf, and in order to give the Court a clear understanding of the facts, to briefly recite the following:

The railroad in question was organized under the laws of Michigan in December, 1872, the articles of incorporation providing for a capital stock of $1,200,000. The only money ever subscribed for shares of the capital stock was for two hundred and ten shares at $100 each, *and the only money paid in upon said subscription was five per cent., to wit*, $10,500. This money was paid by the ten original incorporators. The road was to run between the City of St. Clair, on the St. Clair River, and the City of Grand Haven, on Lake Michigan, a distance of about two hundred and ten miles. In May, 1873, a number of directors, being those resident in New England, resigned (R., 779), and the new board (R., 790, 791) at once proceeded to vote away the sum of $34,000 for salaries to the officers and agents of the corporation, which at this time had no property of its own, and only had the sum of $10,500 of its capital stock paid in. The board then proceeded to authorize its Executive Committee to dispose of its bonds which

had been issued for purposes of construction and equipment, and subsequently, on the 18th of February, 1874 (R., 797), it was resolved that Joseph Henry McChesney, of the City of New York, be appointed the sole agent of the company in Europe to negotiate and sell its bonds, issued under the mortgage foreclosed in this suit, for such price as he might deem most to the interest of the company. It appears, however, that before beginning to dispose of the bonds the company procured temporary loans from three different sources:

First, from a syndicate of gentlemen residing in Philadelphia, and who are called in this suit the Philadelphia parties; secondly, from Benjamin Richardson, appellant, of New York; and, thirdly, from Mr. George G. Sickles, of New York, the father of General Daniel E. Sickles. The Philadelphia parties began advancing money in July, 1873 (R., 622. 623, 499, 535), and continued making advances until the total amount aggregated $156,877.76 (see Schedule, 507, 524). All of these advances were secured to the Philadelphia parties by the delivery of bonds at the rate of $2 for every $1 (R., 488). The moneys advanced by these Philadelphia parties were to be repaid out of the first moneys received from the sale of bonds (R., 918, 953); they were to receive one hundred other bonds of the company as a bonus (R., 813, 1091, 1107, 1113), and they were to receive a large amount of capital stock also as a bonus, and which was to be issued to them as full paid stock. Eight hundred shares of stock were issued to them on the 18th of July, 1873 (R., fol. 1883, page 813). By virtue of a contract made on the 10th of April, 1874, they were to receive five hundred additional shares as a bonus (R., 655, 656, fol. 1547). Although the contract in question by which they were to receive this bonus stock provided that it should be issued upon the completion of said road (R., 656) it appears by the record that on the 11th of October, 1875, this stock was issued to them so as to make their holdings in some way equal to Richardson's, who by this time had obtained considerable stock of the railroad and was rapidly assuming control of affairs (R.,

page 809). The Court will bear in mind that the road was never completed, and was at all times insolvent. The Philadelphia parties, so-called, had been making their advances since July, 1873, and by October, 1875, had advanced most of the money now claimed by them (see Schedule of Advances, 507, 524). They had, as has already been seen, obtained a large number of the bonds of the company as security for their loan, and an additional number as a bonus, and had also obtained, without any consideration whatever, a large amount of the capital stock. About the spring of 1875, however, the appellant, Richardson, entered into a written contract with the company (R., 412), whereby he agreed to advance the sum of one hundred thousand dollars, and as collateral security for its repayment he was to receive two hundred bonds of the company. He was also to receive its notes and seven per cent. per annum as interest upon the loan, and was to be repaid out of the moneys realized upon the sale of the bonds by the financial agent of the company then in Europe (see Agreement, R., 412). It was also provided that he was to be elected director of the company within fourteen days from the date of the execution of the agreement. He was also to receive a bonus of twelve hundred and fifty full-paid shares of capital stock of the company, which the agreement stated were to be given him in consideration of the services rendered and to be rendered by him, and said services were defined by the agreement to be *the good offices of the said Richardson in promoting the interests of the company by his recommendation and influence in the financial world and otherwise.* But an examination of the Record shows that the only influence ever used by Richardson was to further his own interests. The company's interest never seems to have been considered by him. The agreement also provided that the company was to enter at once into an agreement with John A. Elwell, of the City of New York, by which he should go to and remain in Michigan during the construction of the road and superintend the same, and see that the provisions of the said agreement in behalf of

Richardson were carried out and performed, and he was to be paid a liberal sum therefor in addition to his personal expenses (see Agreement, R., 414). Richardson entered into this contract with this company with the intent and purpose of gradually obtaining the control of the company and using it in such a manner as to entirely benefit himself, without regard to the interests of others concerned therein. In fact, an examination of the record necessarily leads to the conclusion that Richardson, from the beginning, dealt with this railroad company as if it were a fat goose waiting only to be plucked by him and in which no other person had any interest or concern whatever. His was a game of grab from March, 1875, until the road went into the hands of a Receiver. He makes no attempt to conceal his motives or intentions, but, on the contrary, boasts of them. In a letter of August 14, 1875, written to Elwell, and found at page 1208, he writes as follows: "I arrived this morning; a lot of letters and one from McChesney; he says I have sold General Sickles' bonds at 70 gold, equal to 87½ gold. * * If he was here and the bonds in English bank I could then go right on and make contracts with Sickles and then go on and sell the bonds. You must, if sharp, see a good deal in these few remarks. * * *What I want is every bond in my hands.*" On the 21st of August, after he had secured possession of all the bonds of the company in New York, which had not been theretofore appropriated by himself and his Philadelphia friends, he writes to his friend Elwell, as follows (R., 1213): "I hope you kept a copy of Brown's books as you went over them, particularly the amount of bonds in New York and the names of all the parties who have any of them. One thing is certain, you and I have to work, dig, or die, and the grave is not yet dug for either of us. I have written you every day. Yesterday that I had secured bonds, but this day Old Hickory Jackson was supreme and sweat a thousand streams, and removed the deposits from one big wigwam to another. But my old predecessor, Jackson, moved his so that they never came out. Not so with Captain Ben, for if he succeeds in getting those from the now

apparent big mogul, McChesney, in London, or rather traveling in Switzerland, *then in due time will* OUR BONDS SHINE. Had much trouble to get bonds on that order. Lawyers wanted it sent back and altered. I fought till I got my bonds on my back, followed by three men. Was it a bond possession or not? *Remember, I am the bona fide Treasurer, as the resolution passed was when the books was examined and found correct; that was done, and books right, and B. Richardson in power.* My not signing two notes has nothing to do with notes, as that was never asked for. As to books, he can keep them if he likes. I am receiver, advancer, head cook and bottle washer, as well as in charge of the codfish in the mizzen-top."

And Elwell writes to him on the 22d of August (R., page 362), telling him to be exceedingly cautious in not saying a word against McChesney, the road or any one connected with the enterprise. The least suspicion that anything is wrong might prove fatal to his, Richardson's, interests. He further states to Richardson, "we will soon have McChesney removed and then you control every bond." Again, on August 28, 1875, Richardson writes to Elwell, "I notice you ask the Commissioners to change the road, that will be nice to have the depot stand on my own land; in yours of the 24th you say a good deal about bonds, but that is right, as I have them safe in the Park Bank vaults. I counted a few bundles of fifty each, except one and that there is twenty-nine in it, and they certified as I dictated what to write and all is O. K." From these letters and the conduct of Richardson, it is clear that it was his idea to get absolute control of the railroad by any means that were possible, without regard to the right or wrong of the matter, so that having control of all the bonds of the company and sufficient of its stock to vote himself whatever he might desire or deem necessary to carry out his plans, he should at last be able say with the bonds and stock of the company in his pocket, the rights of other bondholders and stockholders entirely sacrificed and set aside, that he was the "receiver, advancer, head cook and

" bottle washer, as well as in charge of the codfish in the " mizzen-top." The record shows that he received his two hundred bonds (R., 2[illegible]), and that he advanced various sums of money. Pursuant to the agreement he was made a director of the company (R., 404), soon became the managing director irrevocable, whatever that phrase may mean, as applied to directors of corporations (R., 810), and was appointed Chairman of the Executive Committee (R., 810); he had his creature, Elwell, placed upon the Board of Directors, so that his interests could be protected, and at a subsequent period he had Messrs. Ambrose, Ham and Cooper put upon the board as a further protection to his interests (R., 410, 411, 412, 610, [illegible]). Having discovered in 1875 that the Philadelphia parties were exercising considerable influence in the managing of affairs, he was forced to adjust his differences with them, and in order to propitiate all parties, another slice of company stock was divided between Richardson and the Philadelphia parties, so that Richardson held twelve hundred and fifty shares, for which he had never paid a single dollar, and the Philadelphia parties held thirteen hundred shares, for which they had never paid anything (R. of meeting, 809, and as to the issue and receipt of this stock by the parties, see R., 194, 611, 631, 696, 813, 1056, 490, 502, 522). The testimony of William J. Kelly (R., folios 1437, 1438) shows what the object of this meeting was, and that prior to that time there had been no understanding between the parties, and at folio 1447, he characterizes the meeting as a "love feast," at which all claims of Richardson and the Philadelphia parties were adjusted. At that time only twenty-six hundred shares of stock had been issued (R., folio 2343); of this amount Richardson and the Philadelphia parties held twenty-five hundred and fifty, and the only other shares outstanding were held by George G. Sickles and the original incorporators. So completely were these men blinded in their own interests and so utterly regardless of the rights of others, that they had the impudence at a meeting of stockholders held in January, 1876, to re-

fuse to allow the holders of the original stock which had been issued at the time of the incorporation of the company, and upon which five per cent. had been paid, to vote, and Richardson's committee held this stock invalid, because it was not full-paid stock, and yet they controlled the company by virtue of stock which had been issued to them without a penny consideration being paid for it.

THE MANNER IN WHICH RICHARDSON OBTAINED HIS BONDS.

Reference has been hitherto made in the foregoing statement to a letter to Elwell, in which he states that he had secured bonds. The manner in which he secured them is as follows: Having become a director of the company and received his first two hundred bonds and his shares of bonus stock in March, 1875, on July 5, 1875, at a meeting of the directors, *of which he was one and at which he was present*, it was resolved to give him one hundred bonds as additional security for moneys advanced by him since March 31, 1875, and that may be advanced on the iron contract with the Cleveland Rolling Mill Company, and on August 3, 1875, at another meeting of the board at which he was also present, it was resolved, in consideration of the sums of money advanced by Richardson, and of the sums thereafter to be advanced by him for *purposes of extension and equipment of the road*, that an additional amount of three hundred bonus bonds be given to him, making a total of six hundred of the first mortgage bonds to be held by him as collateral security (R., page 808). Neither these one hundred bonds, nor the three hundred bonds, above referred to, were delivered to Richardson, as appears by the argument hereinafter made, and reference to the record, but in August, 1875, having been elected treasurer of the company, and being thus in a position to get all the bonds of the company in his possession, he goes to the Trust Company in New York City, which held the unissued bonds of the company for safekeeping and for sale, and with an order signed by the railroad company (R., pages 369, 370) obtains 2289 bonds

which he has counted and the numbers inserted in the memoranda made by O. W. Child and M. J. Baney, two persons employed by Richardson, their memoranda appearing on page 371 of the Record. These bonds were delivered to Richardson *by virtue of his office as treasurer of the company, and were to be held by him for safe-keeping.* Notwithstanding this fact he claims on the same day to have taken therefrom four hundred bonds, numbers 3201 to 3600, and separated them from the rest of the bonds, *and these are the four hundred bonds which he now claims should have been allowed to him in addition to the two hundred allowed by the master.* Richardson had thus obtained possession of all the bonds of the company, excepting eleven hundred and five bonds which were still in Europe, held by a bank there. They had been deposited with this bank in London by McChesney, during his efforts to negotiate the bonds of the company. The agent, while in Europe, borrowed from a Mr. Stevens certain money and pledged to him fifty of the bonds as collateral security, and these, together with the eleven hundred and five bonds, the agent and Stevens deposited with the Consolidated Bank of London, with the agreement that the bonds should not be delivered to any one without the joint order or consent of the agent and Stevens. The agent was withdrawn from Europe, but the indebtedness to Stevens was allowed to go to protest, and the directors were fearful that Stevens would not only sell the bonds pledged but would also sell the eleven hundred and five, and the purchaser obtain title to the whole, and thus render nearly valueless the securities held by the directors (Master's Report, page 200, folio 460; see R., 393). Richardson, in order to prevent these bonds being then sold to some one else, but believing that if he got them here he could soon reduce them to his own possession, cabled the money, $11,063.16, for the purpose of obtaining their return to the company, and charged this amount in his account against the company, and it was liquidated and settled at the time the notes were given on July 8, 1876 (Master's Report, page 199, folio 458). These eleven hundred and five bonds

were forwarded to Eugene Kelly & Co. by the English bank, and Mr. Richardson was obliged to pay their commissions for receiving and forwarding the same, amounting to $2,709.70. On the 20th of July, 1876, these bonds were delivered into the custody of the secretary of the company, and so remained until August 11, 1876, when Richardson commenced a suit against the company to recover the indebtedness of the company to him, and attached these eleven hundred and five bonds, and in addition thereto also attached the bonds which he had taken as treasurer from the Trust Company in August, 1875. He subsequently obtained judgment by default in his suit against the company, and sold out these bonds, and also the six hundred bonds which he claimed had been delivered to him as collateral security for his indebtedness, and himself became the purchaser at the execution sale, so that he at least realized his ambition and was able to say that he had acquired all the bonds of the company that were outstanding, and when he filed his claim in this case before the Master he states that he has become the legal owner of 3,574 bonds, being the six hundred above mentioned, and the balance of 2,2[illegible], being those received from the Trust Company and those forwarded by the London bank (R., folio 83, pages 33 and 34). The bonds which were owned by General Sickles and Mr. Stevens, and upon which they were allowed to share in the proceeds of sale, were the only bonds sold in good faith by the company or its agents, and they were issued in the following manner: McChesney, the financial agent of the company, was in London engaged in negotiating the bonds; he had employed General Sickles to assist in the negotiation and sale of bonds and General Sickles had negotiations fairly under way with the Oriental Bank of London and others, for the sale of one million, with the option of the whole issue. McChesney had authorized General Sickles to make to these parties certain representations as to the financial condition of the company, its assets and its prospects—among others, that it was free from financial embarrassments, and the road

so far as constructed had been built by subsidies, by aid notes and by stock subscription, &c., &c. The syndicate required these statements to be authenticated before the British Consul at Chicago, which caused unexpected delay, and McChesney applied to General Sickles to secure a loan of $100,000, which the company required for pressing needs. General Sickles finally arranged for a loan to the company for a commission of five per cent. from his father, George G. Sickles, of New York. The company was to pledge in security for this loan, at seven per cent. for six months, two hundred and fifty of its first mortgage bonds and was to give George G. Sickles ten thousand dollars full paid stock of the company. This arrangement was carried out and the note given, maturing April 15, 1875, and was then renewed for a further term of six months, and a new note given, bearing date April 17, 1875. In July or August, 1875, in Paris, General Sickles purchased one hundred and sixty-three bonds, now produced by him, from McChesney, and in consideration therefor assumed and agreed to pay the note of George G. Sickles. The bonds pledged to secure the payment of the note were to be surrendered to the company. The note was taken up by Daniel E. Sickles and the two hundred and fifty bonds surrendered to the company by George G. Sickles (Master's Report, page 202). The bonds claimed by Benjamin F. Stevens were sold to him by authority of the company in consideration of the indebtedness due from the company to him created by McChesney while in Europe and to induce Stevens to consent to the return of the eleven hundred and five bonds hereinbefore referred to, and the Master found that he became the legal and absolute owner of said bonds on the 13th of April, 1876 (R., 203, 464).

The total issue of bonds authorized by the resolution was 5,500. The Master has appended to his report (see R., pages 220 to 224) a statement showing the bonds secured by the mortgage and the respective claimants. There were unissued 1,039. There were in the hands of different parties, claimants, 4,461. Of this amount there were presented by Richardson and the Philadelphia parties 4,037,

amounting to $4,037,000. The holdings were as follows: Sickles, 163, which were allowed to him; Stevens, 32, which were allowed to him; scattering, 229; the Philadelphia parties, 463, and Richardson, 3,574; total, 4,461. Briefly summarizing, then, the history of this company, we find that the appellees, Sickles and Stevens, bought their bonds in the open market, and are the only ones who acquired their bonds in this manner. *They are in the fullest sense bona fide purchasers and entitled to all rights as such.* Richardson and the Philadelphia parties were the active promoters, stockholders, directors and managers of the company and its affairs. Of the original stock subscribed, a merely nominal sum, only five per cent., had been paid. Richardson and the Philadelphia parties voted to themselves a majority, 2,550 shares of stock, and excluded the original stockholders from participation in the business of the company.

Richardson advanced about		$160,000 00
But he appropriated to himself		
3,574 bonds	$3,574,000	
And 1,250 shares of stock, par value	125,000	
		3,699,000 00

The Philadelphia parties advanced		$143,629 62
And appropriated to themselves		
465 bonds	$465,000	
And 1,350 shares of stock, par value	135,000	
		600,000 00

At the time the appellees, Sickles and Stevens, purchased their bonds, the condition of the corporation was confessedly insolvent, which condition was necessarily known to Richardson and the others who were in control, but was concealed from Sickles and Stevens. The appellant Richardson has now been forced to abandon his claim to the 3,574 bonds, and to reduce it to a

claim to 600 bonds; of these 200 were allowed; and the balance of 400 were rejected by the Master in his report. It is understood by counsel for the appellees, Sickles and Stevens, that the errors principally complained of by the appellants, Richardson and Day, are the refusal of the Master to allow to them 600 bonds instead of 200 bonds, and also his refusal to allow a claim for salvage upon 1,105 bonds claimed to have been redeemed by said Richardson. The manner in which said Richardson redeemed these bonds is stated above, and his claim to a salvage lien upon them will be discussed in the points hereafter.

The road was sold under the decree in foreclosure, and the proceeds of sale were distributed among the parties according to the interests found by the Master in his report.

The exceptions of Richardson and Day will be considered only so far as they affect the rights of the appellees, Sickles and Stevens.

First.

The Master was correct in disallowing Richardson's claim as pledgee or owner of the 400 bonds numbered from 3201 to 3600, inclusive.

1st. Because such bonds were never delivered to him in pledge or as owner, but they came into his hands as unissued bonds belonging to the company, and which he held in custody as an officer of the company.

This is so found by the Master as a fact, and if there is evidence to sustain it, such finding should be held final and conclusive in this Court.

The evidence to sustain it is ample.

Richardson first obtained two hundred bonds under the agreement found at pages 412 to 415 of the record, and these were allowed to him by the Master in his report.

He had entered the directory of the road with the intention of getting every bond in his hands (see his letter to Elwell of August 14, 1875, page 1208, in which he says: "*What I want is every bond in my hands*").

By the agreement already referred to, he had obtained 1,250 shares of the capital stock of the company without any consideration, and had thus placed himself and his creature Elwell in the Board of Directors (Record, 404, 415, 610, 919, 935, 936, 938, 1083, 1115). He was subsequently made managing director, irrevocable (R., 810), and chairman of the Executive Committee (R., 810).

On July 5, 1875, the secretary and treasurer were instructed to deposit with Richardson one hundred of the first mortgage bonds as additional security for the moneys advanced by him since March 31, 1875, and that may be advanced on the iron contract with the Cleveland Rolling Mill Company (R., 806). At this time no additional money had been advanced by him (see his accounts, pp. 391 to 394). He afterwards advanced on the iron contract $25,647.79 (p. 391).

What is the proof as to the delivery of these 100 bonds to him?

Richardson's testimony is contradictory and unworthy of belief.

At p. 407 he testifies he received them from Mr. Ferry (fol. 954), and at fol. 955 he endeavors to make it appear that he received them at a different time from the 300 bonds subsequently voted to him.

At page 603 he again endeavors to convey the idea that he received these 100 bonds apart from the 300.

At p. 608, fol. 1408, he distinctly states that when he received the last 300 he took them and placed them with 300 he already had, thus again claiming that the 100 bonds referred to had already been delivered to him before he received the 300.

At fol. 2228 he reiterates the above statement.

This is the substance of his proof in regard to the delivery of these bonds to him.

The facts, however, as they appear by the evidence are, that these 100 bonds were never delivered to him, and the Master so finds (pages 196 to 200), but on August 30, 1875, he was elected treasurer of the company (p. 808), and immediately thereafter it was resolved that an additional 300 bonds be deposited with him as collateral security.

On August 20, 1885, an order was given to him signed by the railroad company, by the president and treasurer, on the Mercantile Trust Company, New York, to deliver to Benjamin Richardson the bonds of the railroad company in their safe vaults, the keys of which were held by him (pages 369 and 370). Richardson was thus authorized to take into his possession, as treasurer of the company, its unissued bonds.

On that day, August 20th, the bonds were counted by two men, Child and Baney, employed by Richardson, and it was found that there were 2,289 bonds.

Their statement and list of bonds is found at page 371. The numbers were 3201 to 3600, and from 3600 to 5500, in all 2,289 bonds.

These 2,289 were delivered to Richardson on that day (p. 371).

Richardson now claims that he thereupon took out 400 bonds, Nos. 3201 to 3600, and produces a memorandum endorsed upon the statement of Child and Baney to that effect (p. 372). Elwell testifies (fol. 1104) that there was no delivery of the 300 bonds except as above stated and the Master so finds (p. 198, R.).

Taking, then, this statement as true, it flatly contradicts his former testimony quoted above, that he first received 200 bonds and then 100, and finally the 300 which he placed with the other 300 (fol. 1408).

But there are two other answers to this claim of his.

FIRST.—At page 675 appears a receipt given by him to Ferry, the former treasurer of the company, and dated *October* 12, 1875, *nearly two months later*, in which he receipts to Ferry for the 2,289 first mortgage bonds of the

railroad company numbered as detailed in the memorandum of Child and Baney, dated August 20, 1875: "*placed* "*in my (Richardson's) custody as Chairman of the Execu-* "*tive Committee of said railroad company in accordance* "*with the resolution of the Board of Directors, passed* "*October* 11, 1875, *for custody, disposal or sale.*"

Without regard, therefore, to the legal question as to whether Richardson, having received certain bonds of this company *as Treasurer* for safe custody, could take from them 400 and deliver them to himself as an individual, we have the conclusive evidence of himself in the written receipt at page 675, that on October 12, 1875, two months after he claims the bonds were delivered to him, *he still held them*, not in his individual capacity, but as treasurer of the company.

Again, even assuming, for the sake of argument, that Richardson did obtain possession of the four hundred bonds, as pledgee, on the 11th of August, he relinquished and surrendered whatever lien he had when, on the 12th of October, 1885, he gave this receipt to Ferry.

And could not a very strong motive be found for his willingness to surrender and relinquish his lien?

At this time he was, as he describes himself, "receiver, advancer, head cook and bottle washer, as well as in charge of the codfish in the mizzentop;" he was general manager irrevocable, treasurer, director and chairman of the Executive Committee, in possession of all the bonds of the company then outstanding, with enough shares of the capital stock in his possession to absolutely control the company, and thus sanction and approve any course he might see fit to pursue. He was, indeed, the *veritable Pooh Bah of the play.*

Which was better for him, to hold the four hundred bonds as collateral, under the circumstances accompanying their alleged delivery to him, or to hold the 2,289 bonds in his various capacities as "*Pooh Bah*," ready to take advantage of the first opportunity or scheme presenting itself, to assert his title as owner of them all?

At any rate, there can be no doubt but that from the facts above stated and supported by the testimony to which reference has been made, the Master was fully justified in refusing to believe Richardson's testimony, and in finding that there was no delivery of the four hundred bonds by the company to him, and that the giving of the receipt by him to Ferry for the whole number of 2,289 bonds on the 12th of October, 1875, was an admission on his part that he held those bonds, which included the four hundred, as chairman of the Executive Committee of the railroad company, in accordance with a resolution of the Board of Directors, passed on the 11th of October, 1875, for custody, disposal or sale. It will be argued by the appellant Richardson, that by a resolution of the company, passed on the 8th of July, 1876, and appearing on page 827, folio 1902, R., it was recited that the company was indebted to Richardson in the sum of $166,818.97, which loan was secured by the delivery to Richardson of certain of the first mortgage bonds of the company, and that this resolution amounted to a ratification of Richardson's act in taking possession of these four hundred bonds in the manner described. There is no proof, however, that the manner in which Richardson took possession of these bonds had ever been brought to the attention of the company, or its Board of Directors, or that this resolution referred to these four hundred bonds. The company will not be presumed, in the absence of proof, to have known this fact, but it must be presumed to have known that Richardson then held two hundred bonds of the company as collateral security for his loan, which had been delivered to him shortly after the making of the agreement of March, 1875, and it is a well settled principle that there can be no ratification of an act by a principal unless all the facts are known to the principal. *There is no proof of such knowledge.*

The Master was further justified in refusing to allow Richardson's claim to three hundred of these bonds, for the reason that they were given to him for a consideration

which was never paid by Richardson to the company. The resolution under which they were given, at page 808, provided, that in consideration of the sums of money advanced by him, and for the sums hereafter to be advanced, for the purposes of extension and equipment of the road, that an additional amount of three hundred of the bonus bonds should be given to said Richardson. This resolution was passed at a meeting held August 3, 1875 (R., 807), but Richardson thereafter utterly failed to carry out the promise he made to the directors under the influence of which the bonds were voted (so found by the Master, pages 201, 202, folios 461, 462). See also Elwell's testimony (page 478), in which he states (folio 1105), that Richardson had not made any advances after this for the purposes of extension or equipment of the road; that the road had since been extended to Lake View, but that Mr. Richardson did not advance any of the money for such extension (pages 478, 479, 481, folio 1110); that he never advanced any money for the purchase of materials for this division (folio [illegible], page 479), and that he stated as a reason why he did not do so, that certain contributions by other parties interested in the road had not been paid in (*Id.*). At page 480 it conclusively appears that these bonds were voted to Mr. Richardson, not in consideration of moneys advanced by him, but with the view and for the purpose of obtaining further advances to extend and equip the company's road to Lake View (folio 1108), and that this was the substance of the statement made by Richardson to the Board of Directors, upon the faith of which the resolution was passed (*Id.*). At page 545, folio 1230, Elwell further states that the subject of the further extension of the company's road was discussed by the Board of Directors, and that Mr. Richardson then stated to the Board of Directors present, "that if they by resolution would authorize him to receive three hundred full bonds—first mortgage bonds—of the company of $1,000 each, that he would make further cash advances for the purpose of extension and equipment of the road; in compliance with such remarks on his part the company passed a resolution

directing that three hundred bonds should be issued to him" (see also folio 1103). Mr. Richardson nowhere contradicts this statement of Mr. Elwell, and it must therefore be taken as true. In the face of this testimony, therefore, the Master was fully justified in finding as he did at folio 461 and 463 of his report, pages 201 and 202, that Richardson did not carry out the promise he made to the directors, under the influence of which the bonds were voted to him, and under those circumstances he was not entitled to hold these three hundred bonds as collateral security for any amount. Bearing in mind the fact that Richardson was a director of this company and occupied as such a trust relation to the legitimate stockholders, creditors and *bona fide* bondholders of the company, could anything be clearer than that in an equitable suit of this nature the familiar rule must be applied to him that he who asks equity must do equity, and that before he can be allowed to recover upon the three hundred bonds he must be compelled to show that he has complied with the promise and agreement under which he claims to have received them. The consideration for these bonds has therefore wholly failed, and even if it can be held by this Court that they were ever delivered to Richardson pursuant to the resolution, his failure to give the company the consideration which he promised must prevent his recovery upon them. Any other principle applied to him would be contrary to equity and good conscience.

For the foregoing reasons it is respectfully insisted that Richardson is not entitled to recover upon the four hundred bonds embraced in the two claims of one hundred and three hundred.

FIRST.—Because they were never delivered to him by the company, and as delivery is necessary to a pledge, the pledge was never consummated.

Casey *v.* Cavaroc, 96 U. S., 467.
Thurber *v.* Oliver, 26 Fed. R., 294.

SECONDLY.—The alleged delivery claimed by Richard-

son was not a delivery sufficient to vest the title in him as pledgee, because he obtained possession of these bonds, as above shown, as an officer of the company to take them into his custody for sale and disposal, and acting as such officer and in a trust and fiduciary capacity, he could not also represent himself individually and make a delivery of the bonds from himself as trustee to himself as an individual. The two positions were inconsistent with each other. And under all the authorities, some of which are hereafter referred to, preventing a trustee from dealing with trust property for his own benefit, he could not in any other manner acquire any title to the bonds.

Marsh *v.* Whitmore, 21 Wall., 178, 183.
Wardell *v.* R. R. Co., 103 U. S., 651, 658.

In the case of Hoyle *vs.* Plattsburgh and Montreal R. R. Co., 54 N. Y., 314, it was held that the office of director of a railroad company is fiduciary in its character, and as a consequence he is incapacitated from dealing in his own behalf in respect to the corporation property, *or in respect to any matter involving his powers and duties as such director.* But this incapacity is not limited to the limited times that he is acting as such director, but continues during the period of his directorship. Actual fraud or actual advantage in such case need not be shown.

Twin Lick Oil Co. *vs.* Marbury, 1 Otto, 587.
Barnes Arms *vs.* Brown, 80 N. Y., 527, 535.

In Aberdeen R. R. Co., *vs.* Blackie, H. L. cases, 1 Macq., 461, the Court says: A corporate body can only act by agents, and it is of course the duty of its agents so to act as best to promote the interests of the corporation, whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal, *and it is a rule of universal application that no one taking such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal in-*

terest conflicting, or which possibly may conflict with the interests of those whom he is bound to protect.

In Story on Agency, section 210, it is said "that it is a confidence necessarily reposed in an agent that he will act with a sole regard to the interests of his principal so far as he lawfully may."

Can it be said that an agent authorized by a railroad company to take possession of its bonds for the purposes of custody, disposal or sale is acting with a sole regard to the interests of his principal when he takes from the bonds thus given into his custody four hundred and appropriates them to himself?

In 2 Kent's Commentaries, 618, it is said an agent acting as such cannot take upon himself at the same time an incompatible duty. He cannot have an adverse interest or employment. He cannot be a buyer and seller, for this would expose his trust to abuse and fraud.

Did not Richardson have an adverse interest if when he took the 2,289 bonds into his possession for custody, disposal or sale as an officer of the company he also took from them four hundred for his own use?

THIRDLY.—Even if such a delivery can be effectual for any purposes his subsequent act in giving the former treasurer a receipt for 2,289 bonds, including the four hundred bonds, under the authority vested in him by the resolution of the board, as an officer of the board for the purposes of disposal and sale and not in his individual capacity as collateral security, was a waiver and surrender of any lien he might have thereon.

FOURTHLY.—Upon the principle that he who asks equity must do equity, he cannot claim as holder of these bonds, because the consideration upon which they were voted to him has utterly failed, in that he did not advance any money for the completion and equipment of the road to Lake View, as he agreed with the Board of Directors at the time of passage of the resolution authorizing the delivery of the bonds to him.

FIFTHLY.--Because a possession, in order to support a lien, must be justly obtained. No man can acquire a lien by his own illegal or fraudulent act or breach of duty.

Randel *v.* Brown, 2 How., 406.

Second.

The appellants, Richardson and Day, are not entitled to claim the three hundred bonds voted to Richardson at the meeting of August 3d, 1875, for the further reason that the meeting was not a legal meeting of the company, binding upon either the stockholders, the bondholders, or other creditors of the company.

It appears by the testimony of Elwell (page 1047), and by the minutes of the meeting of August 3, 1875 (page 807), that there were present at that meeting Craw, Ferry, Nimms, Richardson and Elwell. The record, at folio 2266, contains a clerical error in referring to the meeting as of August 3, 1876; there was no meeting on August 3, 1876; it should have been August 3, 1875. It further appears by the testimony of Elwell (page 1048) that Richardson came from New York City to Michigan, and that the gentlemen above named, who were all at Michigan, being directors of the company, met in the forenoon, at the office of Nimms, in Muskegon, and there organized a board meeting. At that time Mr. John O'Byrne, of Philadelphia, was a director of the company (page 1050); he was not notified to attend; in fact, there was no notice whatever given of the meeting, except to the parties who were present (page 1050). A number of directors then being in Michigan merely got together and held a meeting (page 1050, folio 2270; page 1051), and no notice was given to O'Byrne, because, as Elwell says, he could not have reached him in time prior to the meeting, and that after

the meeting was held he did not know it was necessary to communicate with him (page 1051).

It is a well settled rule that a corporation is entitled to all the knowledge and skill which each and every director can bring to bear upon the subject before the directors of such corporation. In order that valid action may be taken by such corporation all the members of the board must meet, or be notified to meet, though a majority may control its action, and it is a rule of the common law that unless the statute or by-laws of the corporation prescribe the notice to be given of a meeting, each director must have actual notice, and in default of such notice proceedings had at it are invalid, except all are present and concur in the act.

Rex *v.* Liverpool, 2 Burr, 723.
Rex *v.* Chetwynd, 7 B. & C., 695.
Wiggin *v.* Elders, etc., 8 Metc., 301.
Stow *v.* Wyse, 7 Conn., 214.
People *ex rel. vs.* Albany Med. Col., 26 Hun, 351.
Metropolitan El. R. R. Co. *vs.* Manhattan El. R. Co., 14 Abb. N. C., 288.
In re East Norfolk Tramway Company, L. R., 5 Ch. D., 963.

In the case last above cited six out of seven directors were present at a shareholders' meeting at which a director was chosen. The articles of association provided that no man should be eligible as a director unless he was recommended to the shareholders by the Board of Directors. Sir George Jessel, *M. R.*, held that this was not a recommendation of the board, because no board meeting had been called and no notification had been given to its members.

It may be urged that the by-laws of the company authorized the holding of meetings by the directors without the giving of any notice.

Section 9 of the by-laws, found at page 795 of the record, provides:

"A majority of the Board of Directors may convene at

"any time or place for the transaction of any corporate "business properly belonging to said board."

It being conceded as a well settled principle of law, that a corporation can only act through its *Board* of Directors, and not through the individual action of its members, and that the stockholders and others interested therein are entitled to all the knowledge and skill which each and every director can bring to bear upon the subject before the board, and that any other rule would deprive them of the very object or purpose for which a board is established, the Court cannot construe the above section as dispensing with such notice.

What the section means is that instead of having a designated day and place of meeting, a majority of the board can meet *at any place and on any day*, but notice must be given to all the directors of such time and place, and an opportunity thus given them to attend.

Third.

It cannot be successfully claimed that the resolution adopted at the meeting held in New York on the 8th day of July, 1876, which recited and fixed the amount of Richardson's advances to the company, and also recited the delivery to Richardson of certain of the first mortgage bonds of the company, was a ratification and recognition of the alleged delivery of the four hundred bonds in question to Richardson, for the following reasons: First. It nowhere appears in the minutes of the company's meetings, or in the record in this case, that the attention of the company, or its Board of Directors, was ever called by any one to the manner in which Richardson obtained possession of these bonds, or that the company, as a company, knew that he claimed to have acquired possession of them. Second. The alleged meeting of August 3, 1875, at which three hundred

of these bonds were voted to him, was in no sense a legal meeting of the company, but a mere gathering together of certain of its directors; hence it is not to be presumed that the resolution referred to what was illegally and improperly done. Fourth. The object of the resolution is plainly apparent from its own terms, that it authorized the delivery to Richardson of stock notes in such shape that he could at once sell and dispose of the bonds pledged to him at public or private sale, without notice to the company, and it authorized him to become a purchaser of said bonds. Fifth. An examination of the minutes of that meeting at page 827, and the testimony of Elwell (pages 1057, 1059, 1060 and 1061), shows that this was also an illegal meeting, not called by previous notice, but was a mere gathering together of Mr. Richardson's friends preparatory to his commencing a suit against the company and seizure of the bonds under the attachment and execution. There were present at that meeting Richardson, Nimms, Ambrose, Ham, Cooper and Elwell. Elwell, at that time, was Richardson's friend and representative on the board. Ham, Ambrose and Cooper were all dummies for Richardson, and whom he had placed on the board (R., 410, 411, 412, 610, 1056, 1057). At this time Mr. Kelly was a director of the company; he was not notified of the meeting, in fact no meeting was called, but after the holding of this conference, Elwell called a meeting of the directors for the 18th of July, and sent a notice of such meeting to Mr. Kelly, at Philadelphia (see R., folios 2290, 2291). Elwell's testimony (pages 1057, 1059, 1060, 1061, 1062) shows that this meeting of July 8, 1876, was merely a gathering of Mr. Richardson's friends who constituted at that time a majority of the Board of Directors of this company, Richardson having gained entire control, for the purposes of giving him notes upon which he could begin suit against the company. It was in no sense a legal meeting of the company and the resolution adopted at that meeting could have no binding force and effect.

Fourth.

The appellants, Richardson and Day, are not entitled to the four hundred bonds claimed, for the further reason that at the time of the making of the agreement, or the passage of the resolution under which Richardson claims them, he (Richardson) was a director of the company, which was then insolvent, and he held such a position of trust to the property of the company for the benefit of creditors and all persons and parties interested, that according to the principles applied by courts of equity to cases of like trusts, he is to be held guilty of a breach of trust by securing an advantage to himself not common to other creditors.

He will not be allowed to hold such advantage to the injury of those for whom he was acting.

Bradley *vs.* Converse, 4 Cliff., 375.
Bradley *vs.* Farwell, 1 Holmes, 433.
Coons *vs.* Toome, 9 Fed. R., 532.
Wardell *vs.* R. R. Co. (*supra*).
Thomas *v.* Brownville R. R. Co., 109 U. S., 521.

Counsel for appellees, Sickles and Stevens, does not intend to claim that a director of a corporation is precluded from loaning it money and taking its bonds as collateral security for the repayment of such loan, but the position contended for is, that a director of a corporation, as was said in Twin Lick Oil Co. *vs.* Marbury, 91 U. S., 587, occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and that this is a doctrine founded on the soundest morality.

And as was said in Metropolitan El. R. R. Co. *vs.* Manhattan El. R. Co., 14 Abb. N. C., 270, that when the lender is a director charged with others with the control

and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent.

In Wardell *vs.* R. R. Co. (*supra*), the Court held that directors of a corporation are subject to the obligations which the law imposes upon trustees and agents. They cannot, therefore, with respect to the trust property, occupy a position in conflict with its interests. And a court will refuse to give effect to arrangements of directors of a railroad company to secure, at its expense, undue advantage to themselves.

In Coons *vs.* Toome (*supra*), the Court said that directors of a corporation stand in fiduciary relations to its creditors, towards whom they are bound to act with perfect fairness; they are at least quasi trustees for the creditors, and, where the corporation is insolvent, good faith forbids that the directors should use their position to save themselves, or one of their number, at the expense of other creditors.

In Drury *vs.* Cross, 7 Wall., 299, the Court held, in a case where directors of a corporation had secured with the property of the corporation debts upon which they were liable as endorsers, to the injury of other creditors, the transaction which this case discloses cannot be sustained in a court of equity. The conduct of the directors of this corporation was very discreditable and without authority of law. It was their duty to administer the important matters committed to their charge for the benefit of all parties interested, and, in securing advantages to themselves not common to the other creditors, they were guilty of a plain breach of trust.

In Bradley *vs.* Farwell (*supra*) the Court says: The fiduciary relations between the directors of a corporation being established, and the fact that the trustees in dealing with the trust fund have secured to themselves benefits or

advantages over the other creditors, or a benefit or advantage to themselves as creditors over and above other creditors, taints the transaction and invokes the aid of a court of equity to see to the right execution of the trust. Not that a trustee cannot prefer one creditor to another, as at common law, and outside of the bankruptcy act, but that in equity a trustee cannot contract with himself as he may with third parties. And again at page 444, especially in the case of an insolvent corporation, are the acts of managing officers to be free from the imputation of having been influenced by the consideration of any interests adverse to those they are bound only to regard. Standing in fiduciary relations, as it were, at the bedside of a dying patient, if they are subsequently found in the possession of a portion of his effects they must show title by a conveyance untainted by the exercise of that power which the trust relation gave them, to influence the disposition made by the decedent of his property in their favor and to the prejudice of others having equal claims to the inheritance.

In Bradley *vs.* Converse, 4 Cliff. (*supra*), the Court held that the assets of an incorporated company being a trust fund for the payment of the debts, a court of equity will enforce the execution of such trust in favor of creditors, and the directors will not be permitted by a court of equity to obtain any undue advantage to themselves to the injury of those for whom they are acting in a confidential relation.

The point made therefore is not that Richardson could not as a director lend money to this corporation and take its bonds as collateral security, but that in having any personal transaction with the company his position as trustee compelled him to act with great fairness, and that his dealings must be subjected to the utmost scrutiny, and if it is found that he has abused the confidence reposed in him the transaction will not be upheld.

Examining the record with this rule in view what do we find? By his original contract Richardson had agreed to advance $100,000 and was to receive 200 bonds as collateral security and 1,250 shares of stock as a bonus.

Having become a director of the company and placed his agent Elwell on the board, he proceeded to gradually obtain control of all the property of the corporation and look after his own interests. In fact, it appears that protecting himself and getting what advantages he could for himself seems to have been his idea of the duty of a director.

At the first meeting after his election he was placed on the Executive Committee, and he leased to the company his locomotive and 20 flat and one box car, at the rent of $300 per month (p. 805). By the next meeting he has procured an assignment of the contract with the Cleveland Rolling Mill Company, and the treasurer is authorized to deliver to him 100 additional bonds as collateral security for moneys advanced and to be advanced on the Cleveland Rolling Mill contract (p. 806).

Twenty miles of the company's road are also turned over to him under a lease which he had obtained.

At the next meeting he is elected treasurer, and 300 additional bonds are voted to him, and a lease of the balance of the road is given to him.

The company's notes are issued to him for its indebtedness and 625 shares of preferred stock are voted to him (R., 808 and 809).

He subsequently places his agents, Ham, Cooper and Ambrose, on the board, obtains possession of all the unissued bonds from the Trust Company by virtue of his position as treasurer, and also of the bonds in the custody of the London bank, and then, *at a conference of his friends* on July 8, 1876, in New York City, has the indebtedness of the company to himself fixed and adjusted, obtains from his friend Elwell demand notes therefor, and then proceeds to sell out the bonds under an attachment and execution against the company, and thus claims to have acquired title to the entire number of 3,574 bonds.

Can it be said that such a person appreciated for one moment that he was a trustee for others, or that he owed any duty to the *bona fide* bondholders and creditors of this insolvent company?

Conceding that he advanced more money for the company than he had originally agreed, he had, nevertheless, received a large amount of the company's bonds and stock, and on the 3d of August, 1875, when he knew the company was insolvent (for the record discloses that it never was solvent), with 300 bonds voted to him and 1,250 shares of stock, he secures 300 additional bonds upon the faith of a promise to advance enough money to complete and equip the road to Lakeview, never complies with his agreement, and now seeks to hold these bonds as additional collateral security.

There were other creditors of the road at this time, who are represented in this suit, and who were not so fortunate as to be members of the Board of Directors, and who would have been glad to obtain additional security.

Why should Richardson be allowed to profit by his position as director and secure advantages that are denied to his *cestuis que trust?*

The transactions had by Richardson with the company were unconscionable and unjust to other creditors, and he should not be allowed to benefit by them.

Fifth.

Even assuming for the sake of argument that Richardson had a lien upon these 600 bonds, he lost and surrendered such lien when he delivered them to the Sheriff of the City of New York, and allowed them be sold under his attachment and execution.

Jacobs *v.* Latour, 5 Bing., 130.
Winnard *vs.* Banning, 39 Cal., 543.
Legg *v.* Willard, 17 Pick., 140.
Meeker *v.* Wilson, 1 Gall., 419.
Evans *v.* Warren, 122 Mass., 308.
Bean *v.* Bolton, 8 Phil., 87.

In *Jacobs* v. *Latour*, 5 *Bing.*, 130, Best, *C. J.*, says: "This was an action of trover against a stable-keeper and trainer to recover the value of certain horses placed with him for the purpose of being trained. The first question in the cause is whether the defendant had any lien on the horses; and the second question, whether, if he had a lien, it was destroyed by his taking the horses in execution."

"It is not necessary for us to enter on the first question, because we are of opinion that if he had any lien, it was destroyed by the execution at his suit. A lien is destroyed if the party entitled to it gives up his right to the possession of the goods. If another person had sued out execution, the defendant might have insisted on his lien. But the defendant himself called on the Sheriff to sell; he set up no lien against the sale; *on the contrary, he thought his best title was by virtue of that sale.* Now, in order to sell the Sheriff must have had possession; but after he had possession from the defendant, and with his assent, his subsequent possession must have been acquired under the sale and not by virtue of his lien. As between debtor and creditor the doctrine cannot be favored too much; *but as between one class of creditors and another* there is not the same reason for favor."

In Winnard *vs.* Banning (*supra*) it was held that the lien of a common carrier for freight on transportation of property is lost by the voluntary surrender of the possession. Being a common carrier, if he sues out and procures to be levied a writ of attachment against property on which he has a lien for freight, he thereby abandons and forfeits his lien.

In Legg *vs.* Willard (*supra*) it was held in the case of a deed of assignment of goods, a delivery of a portion of the goods in token of a delivery of the whole, was held to be constructive delivery of goods embraced in the assignment, which were at a distance from the place where the actual delivery of the portion was made, and which were in the hands of a third person and subject to a lien for his labor upon them. The goods subject to the lien having been attached, after the assignment, at the suit of such third

person, upon the claim secured by the lien, it was held that the lien was at an end, and that the assignee might maintain trover (after demand and refusal) against the attaching officer.

In Meeker *vs.* Wilson (*supra*) it was held that property in the hands of a third person, having a lien thereon, is not attachable in a suit against the general owner, but if the depositary waive his lien, the objection does not lie in the mouth of the general owner.

In Evans *vs.* Warren (*supra*) it was held that a mortgagee of personal chattels, by attaching the same in an action for the debt, waives his claim under the mortgage.

The Court said: A party holding personal property by virtue of a mortgage or pledge may waive his claim under such mortgage or pledge, and attach the property in a suit to recover the debt for which the mortgage or pledge was given. *Such attachment is, in itself, a waiver of the claim under the mortgage. The liens respectively created by mortgage and by attachment on the same property are essentially different and can not coexist. They affect very differently, also, the rights of third persons.*

In Bean *vs.* Bolton (*supra*) it was held: A lien is the right to keep or hold, and will be divested by an unauthorized transfer of possession, but under special circumstances the holder may so transfer them as to continue the lien, but the onus of proof is on the holder, as against the owner, to show his lien still continues.

Though a creditor who has a lien on goods for work may put them in the hands of another person without forfeiting the lien, *prima facies* are so much against the transfer that those who rely upon it must show that the transfer was of such a nature as to render it lawful.

A lien will be destroyed not only by parting with possession, but by attempting to retain it otherwise than as security, or by denying the title of the owner, and a conversion of the property will deprive the creditor of power of relying upon it as a defense in an action of tort brought for the conversion, either as set off or in mitigation of damages.

There can be no doubt but that these 600 bonds were sold by the Sheriff under Richardson's execution.

The Master so finds, page 200, and the evidence upon the subject is conclusive.

Richardson himself, in his claim filed in this suit (p. 84), alleges that such proceedings were had in his suit against the company, in which the attachment was issued, that he became the owner of these 600 bonds.

Again, at page 399, he states that the Sheriff at the sale stated he had 600 bonds to sell on account of the judgment.

The notice of sale under execution (folio 1064, p. 461) shows that these bonds were levied upon, because it refers to 3,574, being the 2,974 unissued, and the 600 which Richardson now claims were held by him as collateral.

The account of sales of the Sheriff (p. 461) shows that poundage and fees were charged on these 600 bonds, and this account is approved by Richardson's attorneys.

Again, on the stub of Richardson's check book appears an entry made by Richardson, showing that the Sheriff sold these bonds under the attachment or execution (folio 1402, p. 606).

In the face of this positive evidence it is useless for Richardson to claim that these bonds were only sold by the Sheriff as an auctioneer and to foreclose Richardson's lien thereon.

They were sold under the execution and his lien is gone.

In his efforts to obtain control of every bond *he overreached himself and lost whatever lien he had on these 600 bonds.*

That Richardson intended to waive his alleged lien upon the 600 bonds and claim a title under the Sheriff's sale, is further evidenced by the fact that at the meeting of July 8, 1876, he was given notes for his indebtedness, which recited that they were secured by bonds, and he was authorized to sell the bonds at public or private sale without notice, and himself become the purchaser (R., p. 828).

He presented these notes to Elwell for payment at his lawyer's (Davison) office, and under instructions from his lawyer *the notes are torn up* and new notes are given, which do not recite the holding of bonds as collateral, but are simple demand notes. This is done because his lawyer tells him that "*everything must be attached. The bonds must be all attached*" (fol. 2286, pp. 1060, 1061 and 1062.

Believing, therefore, that he would acquire title to all the bonds of the company by the sale under the attachment and execution in his suit against the company, he surrenders his claim to hold these bonds as collateral, destroys the note reciting that fact, and accepts a new note not referring to any bonds or any lien, and then proceeds to have the bonds sold by the Sheriff, as above detailed, and when he presents his claim in this suit he asserts a title to these bonds, not by reason of their having been pledged to him as collateral, but because he purchased them under the execution in his suit against the company (Record, 34).

And the Master so finds (p. 200, folio 459).

Sixth.

Any claim Richardson may make on this appeal to "equitable salvage" for redeeming the 1,105 bonds must be disallowed.

The facts as to the redemption of these bonds have been above set forth and are fully found by the Master in his report at folios 459 and 460.

The reason given by the Master for disallowing this claim is sound.

Richardson had these bonds brought from London so that he could do, what he was afraid would be done abroad by some one else, viz.: seize them and sell them out under execution, and thus acquire title to all.

It requires no citation of authorities to sustain the proposition that one who asserts such a lien must show good faith and an honest purpose.

Richardson's motive was far from honest, and he exhibited bad faith throughout.

Seventh.

The decree of the Circuit Court should be affirmed.

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